

**Meaningful Community Participation in Land Use Decision Making Through Ad Hoc  
Procedures in New Haven, Connecticut**

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## I. INTRODUCTION

The last few decades have seen efforts to develop community-based planning models and other mechanisms for increased community participation in the land use approval process. Community Benefits Agreements (CBAs), in particular, have risen in popularity across the nation as a tool for ensuring meaningful participation in development. Such agreements generally arise from direct negotiation between community groups and developers where community groups push to secure community benefits in exchange for support. At the same time, however, takings law doctrine may be shifting in a way that could dissuade cities from actively incorporating community groups into planning or negotiating with developers. Two Supreme Court decisions in the 1980s and 1990s, *Nollan v. California Coastal Commission*<sup>1</sup> and *Dolan v. City of Tigard*,<sup>2</sup> imposed limits on how a municipality could exact benefits from a developer to guard against involuntary taking of property. In addition, states have increasingly enacted statutes curbing cities' powers when it comes to exactions.<sup>3</sup>

To the extent that including community groups in negotiations between cities and developers could lead to involuntary takings claims by developers when those groups push for benefits, the shift in takings law may arguably encourage planning departments to avoid creating processes or mechanisms that actively involve community groups in this manner. Such a possibility invites analysis into how cities actually craft processes for community participation in land use decision making. This paper examines New Haven, Connecticut's formal and informal mechanisms for community participation.

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<sup>1</sup> *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987).

<sup>2</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>3</sup> See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 795-96 (2d ed. 2000).

Although academics have explored the shift towards increased community participation and devoted much study to the principles that underlie (or should underlie) it, few articles analyze the way particular cities respond to those trends and principles. And while a rich literature explores the consequences of *Nollan* and *Dolan*, articles have not probed the potential indirect impact of those decisions on a city's approach to community participation.<sup>4</sup> Thus, this article responds in a practical way to the theoretical tension between the trend pushing for more community participation and the trend pushing for increased scrutiny of exactions. It also aims more generally to contribute to the literature on community participation in land use.

New Haven has long been one of the poorest cities in the country with approximately 24% of its population living below poverty.<sup>5</sup> Not surprisingly, City Planner Karyn Gilvarg notes that she lives “in fear of” developers “walk[ing] out” given the need to balance jobs, taxes, and other pressures.<sup>6</sup> Yet, despite its seemingly dire need for development and investment, New Haven has also stood out nationally by supporting community groups' push for CBAs, which, by nature, will almost inevitably slow down or threaten proposed developments. In 2004, the Board

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<sup>4</sup>See e.g., David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663 (2001) (analyzing development agreements and arguing that such agreements are a solution to the constitutional limits constraining negotiations between local governments and developers); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 4, 6 (2000) (arguing that the *Nollan* and *Dolan* decisions have increasingly led to a “conceptual disconnect” resulting from constraints on land use bargains without similar constraints on other land use decisions carried out by local governments and proposing a “framework for land use entitlements which would allow unrestricted bargaining over land use”); Vicki Been, *“Exit” As A Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 478 (1991) (“[A]nalyz[es] whether competition in the market for development is sufficient to constrain local governments from overregulating or overcharging through development exactions, and therefore renders unnecessary the judicial scrutiny associated with the unconstitutional conditions doctrine.”).

<sup>5</sup> The U.S. Census bureau reports a population in New Haven of approximately 124,000. US CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/09/0952000.html> (last visited Apr. 23, 2011). According to American Community Survey statistics for the 2005-2009 period, 24.4% of New Haven's population lives below poverty. US CENSUS BUREAU, [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-geo\\_id=16000US0952000&-qr\\_name=ACS\\_2009\\_5YR\\_G00\\_S1701&-ds\\_name=ACS\\_2009\\_5YR\\_G00](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=16000US0952000&-qr_name=ACS_2009_5YR_G00_S1701&-ds_name=ACS_2009_5YR_G00) (last visited Apr. 23, 2011).

<sup>6</sup> Interview with Karyn Gilvarg, Executive Dir., City of New Haven City Plan Dep't., in New Haven, Conn. (Jan. 24, 2010).

of Aldermen adopted a Resolution to encourage such agreements,<sup>7</sup> and in 2006 the City entered into a CBA with a cancer center seeking to expand.<sup>8</sup>

Part II of this paper discusses in more detail the trends in land use that make the study of community participation in practice especially relevant today. Part III briefly traces some basic theory on the meanings, origins, and reasons for community participation in land use. Part IV begins an examination of how New Haven includes the community in land use decision making by summarizing federal, state, and local laws that constitute the basic formal mechanisms for participation. Part V uses four case studies to delve into the different ways the City affirmatively brings communities into the land development process or otherwise allows communities to shape the nature of their participation. Part VI distills the case studies presented to construct a more generalized analysis of the interplay between formal and informal mechanisms. Part VII concludes with a summary of how New Haven arguably approaches community participation in light of two possibly conflicting trends.

Overall, this study of community participation in New Haven's land use approval process identifies a flexible planning process that allows for meaningful community participation. It also identifies planners who pay little, if any, attention to the trend in takings law embodied by decisions like *Nollan* and *Dolan* when developing their approach to community participation. And in making observations about flexibility in New Haven's approach to planning, this paper adds to Shruti Ravikumar Jayaraman's empirical assessment of planning in New Haven. Ravikumar Jayaraman argues that New Haven's Planned Development District (PDD) process (a

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<sup>7</sup> New Haven, Conn., Resolution Encouraging Developers to Enter Into Community Benefits Agreements in Order to Enhance the Economic Viability of New Haven (July 6, 2004) (passed unanimously by the New Haven Board of Aldermen) (on file with author).

<sup>8</sup> Louise Simmons & Stephanie Luce, *Community Benefits Agreements: Lessons from New Haven*, WORKINGUSA: THE JOURNAL OF LABOR AND SOCIETY, Mar. 2009, at 97, 103.

controversial, often used zoning tool in New Haven) presented a desirable shift from traditional Euclidean zoning towards more flexibility and ad hoc bargaining in planning.<sup>9</sup> This paper does not focus on whether flexible zoning mechanisms or ad hoc standards embodied in tools like the PDD represent a better approach to planning generally. However, it does suggest that flexibility may present a good way to achieve greater and more meaningful resident participation in land use decision making (a factor which some would certainly argue itself makes for more legitimate, democratic, and efficient planning, as Part III outlines). The case studies examined here show how flexibility in New Haven's approach to planning can lead the City and communities to collectively craft ad hoc procedures for community engagement that far surpass those guaranteed by law.

However, case studies examined here also caution that New Haven's flexible planning process may disadvantage less sophisticated communities when it comes to participation. The current process risks leaving low-income, largely minority communities with relatively minimal mechanisms for involvement in land use decisions. Thus, regardless of whether the basic notice and hearing requirements established by law are sufficient in terms of participation, and regardless of whether one sees as desirable community participation that goes beyond what is legally required, New Haven's openness to ad hoc participation procedures raises important equity concerns. But it may also present a call to action to public interest lawyers and community activists. New Haven's approach to planning and participation can clearly lead to significant power and engagement for communities ready and willing to push for the kinds of processes they want on a project-by-project basis.

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<sup>9</sup> Shruti Ravikumar Jayaraman, *Unplanned Change-Challenging Tradition in Land Use Controls: The Case of New Haven's Planned Development District*, 39 Urb. Law. 415 (2007).

## II. TRENDS THAT MAKE COMMUNITY PARTICIPATION ESPECIALLY RELEVANT TODAY

A number of trends over the last few decades call for increased community participation in the land use approval process. These include the shift towards collaborative urban planning, an environmental justice movement pushing for community involvement in development decisions, a growing distrust of public-private partnerships, and the emergence of CBAs. On the other hand, taking law changes captured by the Supreme Court's decisions in *Nollan* and *Dolan* arguably create legal disincentives for local governments to actively foster community participation in land development. Therefore, recent changes both within and outside the law have complicated and made more salient the question of what local governments should do, as well as what they are currently doing, with regards to community participation in local land use decisions.

### A. Trends Pushing for Increased Community Participation in Land Use

Over the last forty years, urban planning has transitioned from a technocratic model to a process allowing for increased stakeholder participation.<sup>10</sup> Lawrence Susskind, Mieke van der Wansem, and Armand Ciccarelli explain that technocratic urban planning, which “is dominated by concerns about economic efficiency in the use of space,” shifted from a technocratic model to

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<sup>10</sup>LAWRENCE SUSSKIND ET AL., *MEDIATING LAND USE DISPUTES: PROS AND CONS*, 2-5 (Ann LeRoyer ed., Lincoln Institute of Land Policy 2000). *See also* Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POL'Y 157, 159 (2009) (Salkin and Lavine point to a shift in urban planning toward “[c]ommunity-based planning efforts...to improve the planning process by focusing on small and distinct geographic areas and by developing collaborative and inclusive planning programs.”); Craig Anthony Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVT'L. L. 441, 476 (2007) (Craig Anthony Arnold reflects this overall shift towards more stakeholder participation in land use when acknowledging that “increasingly neighborhood residents are actively participating in developing plans and land use regulations for their neighborhoods through techniques like design charrettes, scenario development, impact assessment, [and] participatory land use mapping,” among others.).



an advocacy model in the late 1950s and early 1960s. The shift was an effort...to “redistribute resources more fairly, increase social equity, and improve quality of life for minority groups and the poor.”<sup>11</sup> The advocacy model, in turn, led some planners facing escalating land use conflicts to a “third planning model based on consensus building and assisted negotiation.”<sup>12</sup> This mediation model aims to “[e]nsure that the interests of all stakeholders are taken into account along with the best possible technical advice.”<sup>13</sup>

A growing environmental justice movement has separately increased the importance of community participation in planning decisions, at least when they involve environmentally worrisome developments. Authors have noted that, “the next frontier for both the [environmental justice] movement and the focus of environmental justice scholarship...is land use planning.”<sup>14</sup> California, for instance, has been “incorporating environmental justice concerns into the local land use planning process,” to “ensur[e] meaningful participation by all cross sections of the community...”<sup>15</sup> In Connecticut, an environmental justice statute passed in 2009 reflects this focus on community participation, and, as explained in Section V, has led to a unique and substantive form of community participation in New Haven.<sup>16</sup>

An expansion of public-private partnerships in local land use has bred distrust of such arrangements, which, in turn, has increased efforts to include communities in land use decision

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<sup>11</sup> SUSSKIND ET AL., *supra* note 10, at 3-4; *See also* Salkin & Lavine, *supra* note 10, at 168.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> Salkin & Lavine, *supra* note 10, at 175 (quoting Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1 (1998)).

<sup>15</sup> *Id.* at 175.

<sup>16</sup> CONN. GEN. STAT. § 22a-20a (2011).

making.<sup>17</sup> Audrey McFarlane argues that popular sentiment has called for “some external check” on these arrangements, especially after the recent *Kelo v. City of New London*<sup>18</sup> decision, which she characterizes as possibly “idealistically deferential” to public-private partnerships.<sup>19</sup> Indeed, McFarlane demonstrates how some courts have held that the deliberations of such partnerships must be open to the public. In the case of *Baltimore Development Corp. v. Carmel Realty Associates*, the court required the city’s chief independent economic development arm, the Baltimore Development Corporation, “to comply with the Maryland’s Public Information Act mandating disclosure in open meetings and disclosure of public information by city and state entities.”<sup>20</sup>

Finally, the recent rise in agreements between developers and community groups reflects a growing interest in new forms of community participation in the land use approval process. CBAs “creat[e] a contractual relationship between community organizations and the developer, in which the developer agrees to provide designated benefits in exchange for community support for the project.”<sup>21</sup> McFarlane, in discussing the growing distrust of public-private partnerships

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<sup>17</sup> In response to the growth of public-private partnerships in inner-city redevelopment efforts, Patience A. Crowder argues that “increased formality is needed in the inner-city redevelopment process to achieve significant community participation.” Patience A. Crowder, *“Ain’t No Sunshine”: Examining Informality and State Open Meetings Acts As the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 625 (2007). She believes that quasi-public development entities, “market themselves as private entities whose deliberations are not subject to open meetings acts.” *Id.* at 625. Consequently, she sees “the majority of deliberations and decisions concerning inner-city redevelopment projects occur[ing] in private.” *Id.* Crowley proposes two solutions: 1) “the strengthening of the text of open meetings acts to require more open meetings, specifically including the meetings of quasi-public development entities,” and 2) “the creation and implementation of formal community participation mechanisms by local governments.” *Id.* at 625-26.

<sup>18</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>19</sup> Audrey G. McFarlane, *Putting the “Public” Back into Public-Private Partnerships for Economic Development*, 30 W. NEW ENG. L. REV. 39, 47 (2007).

<sup>20</sup> *Id.* at 54-55.

<sup>21</sup> Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 1 U. CHI. LEGAL F. 187, 206 (2009).

sees CBAs as a means to bring in values such as “inclusiveness, transparency, coalition building, and clarity of outcomes...” into the land use approval process.<sup>22</sup> Authors also argue that CBAs may stem from a desire on the part of the labor movement to make gains outside of more traditional union organizing, a general interest in promoting inclusiveness and accountability, and the shift previously described from centralized to more community-based planning.<sup>23</sup>

The first CBA “emerged in Los Angeles in 2000 as a way to give greater scope for community input in redevelopment decision making.”<sup>24</sup> A broad coalition of labor and civil organizations “used the threat of holding up” a “proposed \$1 billion sports and entertainment complex” by “contesting environmental and land use approval to negotiate a CBA” with the developer.<sup>25</sup> A multitude of authors have subsequently shown how it led “to an explosion of CBAs around the country,”<sup>26</sup> although their emergence has not gone uncriticized. Some contend that they inappropriately sidestep the regular planning process, that they may pose exactions problems, and that they often unfairly represent various subgroups at the expense of others.<sup>27</sup>

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<sup>22</sup> McFarlane, *supra* note 19, at 57.

<sup>23</sup> See e.g., Cummings, *supra* note 21 (discussing the rise of CBAs as a response to a stalled or failed labor movement); Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 37 (2008) (arguing that CBAs can “promote the core values of inclusiveness and accountability.”); and Salkin & Lavine, *supra* note 10, at 168-69 (“The ideals of inclusiveness, democracy and public participation remain fundamental to community-based planning, and they have become core principles of the community benefits movement as well.”).

<sup>24</sup> Cummings, *supra* note 21, at 206.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; See also Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 6 (2010); Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: CBAs Have Both Opportunities and Traps for Developers, Municipalities, and Community Organizations*, PRAC. REAL EST. LAW, July 2008, at 19, 19-20; Gross, *supra* note 23, at 36.

<sup>27</sup> Salkin & Lavine, *supra* note 10, at 177 (“[T]he CBA contract model allows community coalitions to bypass the traditional planning process entirely.”); *Id.* at 198 (“The CBA has demonstrated that specious appearances of community involvement can legitimate departures from the normal planning process when, in fact, the CBA’s effect may be to make development projects less accountable, less transparent, and more exclusionary than they would otherwise be.”); Steven P. Frank, *Yes in My Backyard: Developers, Government and Communities Working*

But regardless of their validity or wisdom, the spread of these agreements offers yet another way in which more community participation has increasingly made its way into the land use approval process.

## **B. The Takings Doctrine as a Potential Disincentive for Increased Community Participation in Land Use**

In contrast to the various trends pushing for community participation in land use processes, the Supreme Court's recent decisions in *Nollan* and *Dolan* (as well as increasing numbers of state statutes curbing exactions), may, at least theoretically, discourage local governments from actively involving the community in their development processes. In general, takings law has made local governments more vulnerable to takings challenges.<sup>28</sup> Together, *Nollan* and *Dolan* require exactions to pass essential nexus and proportionality tests.

For many, *Nollan* and *Dolan* also signaled increased scrutiny, if not an actual villainizing of local government when it comes to development negotiations.<sup>29</sup> Indeed, Lee Ann Fennell

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*Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227, 254 (2009) (Noting that a "pattern of limited community involvement was...seen in the Yankee Stadium CBA, an agreement to which no community organizations were parties. Instead, four elected officials signed the agreement on the community's behalf...The chairperson of the distribution committee had political ties to several of the signatories, and the identities of the rest of the distribution committee have not been publicly disclosed."); Been, *supra* note 26 (raising the possibility that CBAs may pose an unlawful exactions problem as well as discussing the possibility that groups negotiating CBAs with developers may not be adequately representative of the community).

<sup>28</sup> In *Nollan*, the Court "held that the California Coastal Commission violated the Fifth Amendment by conditioning a building permit for beachfront property on the owners' dedication of an easement allowing the public to walk on the portion of the property nearest the ocean." Been, *supra* note 4, at 473 (1991). The Court imposed an "essential nexus" test whereby the condition in that case had to "bear an 'essential nexus' to the cited harm associated with the larger house—a blocked view of the ocean." Fennell, *supra* note 4, at 9. In *Dolan*, "the city of Tigard attempted to condition the grant of a landowner's request to expand her plumbing store on the dedication of a portion of her land for storm drainage and the construction of a bike path." *Id.* at 9. But although the court found an essential nexus between the conditions and the projected impacts of the expansion, the Court held that "the concessions had not been shown to be roughly proportionate to these harms." *Id.*

<sup>29</sup> "The majority opinion in *Dolan* does not accuse the city of Tigard of extortion, yet the Court's insistence on detailed proof of the quantity of harm and remediation associated with a particular land use bargain is consistent with *Nollan*'s view of government officials as opportunistic 'villains.'" Fennell, *supra* note 4, at 14.

argues that “it is noteworthy that the term used to designate the landowner’s concession in the land use bargain – ‘exaction’ — is not just heavily loaded but is actually a synonym for ‘extortion.’”<sup>30</sup> Therefore, local governments may see *Nollan* and *Dolan* as a reason to rethink the way they generally negotiate with developers and include the community in those negotiations. And some evidence may already exist that *Nollan* and *Dolan* can discourage, if not diminish, existing community participation in the conditional zoning context. Erin Ryan analyzes a variety of anecdotal evidence on the impact of *Nollan* and *Dolan*. She points out that at least some planners have shifted negotiations with developers over zoning underground as a result of the Supreme Court decisions.<sup>31</sup> In this scenario, not only will city planners be less inclined to develop mechanisms for community participation, but citizens will be less able to monitor interactions between developers and the city, much less actually find ways to demand participation in that process.<sup>32</sup>

In addition, the academic literature has pointed out that *Nollan* and *Dolan* could affect the validity of development agreements and even CBAs, not just conditional zoning agreements like those involved in the Supreme Court decisions. Development agreements occur when cities grant developers a vested right to proceed with a development in return for various community

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<sup>30</sup> *Id.*

<sup>31</sup> Ryan describes how a planner in Cincinnati, Ohio noticed that the *Nollan* and *Dolan* cases drove bargaining underground. She states that “rather than meeting with the zoning authority to discuss mutually agreeable solutions to a proposed land use requiring permission, developers facing the possibility of a denied permit would now meet directly with planning staff, with whom they would create an informal joint proposal that they would later propose to the zoning authority on their own initiative.” Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 367 (2002).

<sup>32</sup> Ryan, overall, concludes that “many commentators and practitioners suggest that only marginal changes have occurred” after *Nollan* and *Dolan*. *Id.* at 366 (2002). But see Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 107 (2001) (“[T]he [takings cases] could have profound implications for land use planning. Developing communities may as a result of the decisions engage in more systematic planning, leading them to realize they can impose higher, not lower, impact fees. Heavily built out communities with significant unmet infrastructure needs, by contrast, may find that the decisions restrict their ability to impose exactions on developers even further. The consequences for urban/suburban relationships could be quite serious.”).

benefits.<sup>33</sup> Scholars point out that the *Nollan* and *Dolan* limits on negotiated agreements between developers and cities do not apply to development agreements because “in most cases, development agreements are promises of forbearance from action, rather than promises of action on the part of the local government.”<sup>34</sup> Nevertheless, others argue that the agreements may be susceptible to a takings challenge if the agreements are involuntary or unreasonable.<sup>35</sup> Thus, a city may not want to create mechanisms for community participation that will expose developers to community demands for benefits along with threats of opposition; a developer could theoretically allege that any development agreement arising out of such conditions is involuntary.

In the CBA context, Vicki Been has argued that CBAs could pose an exaction problem, although courts have not yet confronted the issue directly.<sup>36</sup> She notes that “[i]f the ‘leverage’ community groups have to convince developers to enter into negotiations stems from an explicit or implicit requirement that the landowner enter into a CBA before seeking government approval

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<sup>33</sup> Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761, 762-63 (1993). Additionally, state statutes often authorize these agreements in order to avoid reserved powers problems as well as “Contract Clause issues that arise when governments attempt to freeze regulations.” Frank, *supra* note 27, at 241 (2009). However, the constitutionality of statutory “development agreements has not been ruled on in any published appellate court decision.” Curtin and Edelstein, *supra* note 33, at 766. Development agreements are also said to promote flexibility by “allowing terms and conditions that are different from and more detailed than the requirements of land development regulations and the statutes authorizing them.” JOHN R. NOLON ET AL., *LAND USE AND COMMUNITY DEVELOPMENT: CASES AND MATERIALS TEXTBOOK* 393 (Thomson/West 2008) (2008). They bring “certainty by making all elements of the agreement enforceable, against the local government as well as the developer.” *Id.*

<sup>34</sup> Frank, *supra* note 27, at 245.

<sup>35</sup> Callies, Curtin, and Tappendorf note that as long as the agreement is voluntary, it appears that local governments can go further in what they negotiate than in the traditional conditional zoning scenarios. DAVID L. CALLIES ET AL., *BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES* 112 (Environmental Law Institute 2003). Moreover, they acknowledge arguments that “exactions agreed to under a voluntary development agreement must bear a rational nexus to the needs created by the development” because the ‘rational nexus’ and ‘substantial advancement’ standards of *Nollan* are not limited to just those instances where the municipality requires an exaction from an uncooperative landowner.” *Id.*

<sup>36</sup> Been, *supra* note 26, at 27.

of the land use proposal,...courts may view the negotiations as posing no less (and perhaps more) risk of ‘extortion,’ ...than the local government’s processes at issue.”<sup>37</sup> And where governments actively encourage, and perhaps even aid in the negotiation of, CBAs, Been notes that courts could “find sufficient government involvement in the negotiations themselves to trigger the legal restrictions that apply to the government.”<sup>38</sup>

The possibility that an increased risk of takings challenges will discourage cities from promoting or enforcing community participation processes in the land use approval context calls for an examination of how cities view community participation and whether they are, in fact, responding to *Nollan* and *Dolan* in this manner. This essay’s assessment of community participation in New Haven’s land use approval process aims, in part, to identify whether at least one city considers takings law in crafting mechanisms for community participation within the approval process.

### **III. BRIEF OVERVIEW OF THEORY ON COMMUNITY PARTICIPATION IN LAND USE**

Political theorists, urban planners, and scholars offer a variety of theoretical and practical reasons why the land use approval process should make room for community participation. This essay attempts only to give just enough of a summary of this complex and growing literature in order to better understand why New Haven may want to include communities in its land use decision-making. Among the theoretical or normative discussions are ideas about democratic legitimacy as tied to participatory processes, the historical and cultural basis for participation at the local level, and normative theories about empowerment or protection of marginalized groups.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 28.

The more practical justifications for community participation in the land use context emphasize the ability of community participation processes to improve long-term planning and efficiency. Arguments against more robust community participation processes, however, emphasize competitive federalism, costs, and questions about what constitutes “community” or what makes a group “representative.”

### **A. Theoretical Justifications for Community Participation**

Democratic discourse theory offers one way in which academics view participation as a means of promoting democratic legitimacy. The theory presents a “process ‘solution’” to a perceived increase in the complexity of “modern social and legal problems [that] no longer lend themselves to easy two-sided contested positions for resolution.”<sup>39</sup> The theory is premised on the notion that communication, dialogue and deliberation by constituencies, citizens, voters, and decision makers will produce better and more legitimate outcomes.

Others who focus on local government and land development have emphasized how direct community participation in local government decision-making reflects a historically persistent and fundamental notion of American democracy. Alan Altshuler, for example, examined community participation in the form of increased control over decision-making in poor black neighborhoods in the 1970s. He noted and traced how “[t]he strong preference of Americans for political decentralization has...shaped a good deal of the nation’s history.”<sup>40</sup> McFarlane, in attempting to derive justification for community participation in land development, also acknowledges how direct participation appeals to a culturally ingrained notion

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<sup>39</sup> Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 352 (2005).

<sup>40</sup> ALAN A. ALTSHULER, COMMUNITY CONTROL: THE BLACK DEMAND FOR PARTICIPATION IN LARGE AMERICAN CITIES 96 (Pegasus 1970).



of democracy in how it represents “the most direct analogue to the New England town meeting that often serves as the rhetorical justification for direct democracy and our normative vision of government.”<sup>41</sup>

Finally, in addition to ideas of democratic legitimacy and the nature of American democracy, authors often point out how community participation in today’s land use decision-making process can or should counter elite and private interests otherwise favored by the process. Some explicitly call for community participation as a way to empower marginalized communities to resist the prevailing power imbalance. Others more generally acknowledge a power imbalance and see community participation as a way to counter it. Others still do not explicitly espouse empowerment theories, but raise third party-related concerns that support an empowerment basis for greater community participation.

McFarlane has analyzed instrumental, democratic or process-based, and empowerment justifications for community participation in development. In discussing instrumental theories of community participation (which refer to how participation can yield administrative efficiency), McFarlane states that to the extent that “participants bring goals to the table that are inconsistent with the pre-defined and privatized goals of development, the process will either stop or the inconsistent goals will be discarded as irrational, impractical, or simply undesirable.”<sup>42</sup> For her, “the greatest problem for instrumental theories in justifying participation as a goal is their over-reliance on extrinsic justifications of bureaucratic rationality that fail to acknowledge the intrinsic value of community participation for the participants, regardless of efficient or rational

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<sup>41</sup> Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 903 (2001).

<sup>42</sup> *Id.* at 902.

outcomes.”<sup>43</sup> For McFarlane, democratic participation theories alone, on the other hand, fail to take into account that “discourse usually marginalizes those who do not talk or those who talk in marginalized ways.”<sup>44</sup>

Ultimately, McFarlane argues that “empowerment or political control theory” offers the best justification for community participation in the land use approval process. Assuming conflicting interests amongst disparately powerful groups in land development, not just community participation, but meaningful participation, presents a possible form of resistance for disadvantaged groups.<sup>45</sup> She even proposes a scheme for achieving “meaningful” participation. It requires: 1) that local government include community participants in the development decision-making process early so as to allow them to shape the goals of development in the first place; 2) an “enforcement mechanism” for failing to follow its procedures; and 3) that local governments should not wait to devolve decision-making power to communities only when development projects arise – they should “allow community participation and education in the business of community-decision making on real decisions regularly.”<sup>46</sup>

Craig Anthony Arnold, in examining criticisms of the current land use regulatory system, also acknowledges power imbalance. He notes how the land use regulatory system may be unfair in how it is “controlled by dominant groups in society, especially non-Hispanic whites, wealthy development and business interests, and high-income communities.”<sup>47</sup> He cites a variety of authors who “point to examples of racism, class bias, and exercise of power by elites in land use

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 915.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 931.

<sup>47</sup> Arnold, *supra* note 10, at 456.

policies and patterns.”<sup>48</sup> And although he does not push for a normative or empowerment-based theory of community participation, he views increased use of community participation as a way in which the land use regulatory system can and does mediate the imbalance of power.<sup>49</sup>

Finally, the fact that negotiations between developers and governments may implicate third party rights points in favor of increased community participation in the land use approval process. In discussing the pros and cons of the *Nollan* and *Dolan* nexus and proportionality tests, Fennell points out that the tests could help prevent local government from engaging in conditional zoning bargains that “unfairly burden a group within the community.”<sup>50</sup> In other words, she points out the vulnerability of third parties to negotiations between developers.<sup>51</sup> Indeed, presumably in response to this concern (at least in part), some states have required public hearings before approving development agreements.<sup>52</sup>

## **B. Practical Justifications for Community Participation**

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 476-77.

<sup>50</sup> Fennell, *supra* note 4, at 54.

<sup>51</sup> More generally, authors like Richard Epstein have prompted scholars to question the legitimacy of exactions because of their potential violation of the unconstitutional conditions doctrine. Epstein acknowledges potential problems with the implication of third party rights in a government’s negotiations with private parties in his thinking on the unconstitutional conditions doctrine. He notes, for example, that “conditions will not be imposed if everyone is hurt equally by them, but they may become part of a system of contracts or grants if they work to the benefit of a dominant faction and against the interests of others.” Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 23-24 (1988). Lee Anne Fennel and Vicki Been present two examples of authors incorporating Epstein’s ideas on third parties in their own thinking on exactions. *See* Fennell, *supra* note 4; Been, *supra* note 4.

<sup>52</sup> David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 686 (2001).

Authors often cite community participation as a practical tool in land-use decision-making. Some tout community participation's ability to ensure a "better" long-term vision as well as a greater chance of success for a particular project or decision. Others point to potential cost benefits and overall administrative efficiency as reasons for more community participation.

One criticism of practices associated with increasingly common bi-lateral agreements between cities and developers is that such practices allow planners to ignore long-term impacts of their decisions. Alejandro Camacho, for example, notes that "[w]hile negotiation-based regimes do reject the unworkably rigid, detailed plans at the core of traditional planning, these new regimes have largely failed to produce planning alternatives that take into consideration long-term and cumulative impacts."<sup>53</sup> He argues that a "collaborative land use model" could address this long-term vision problem.<sup>54</sup> His proposed model calls for stronger democratic institutions through broad and meaningful participation in agreement negotiation, as well as sustained problem solving, rather than [an] adversarial, approach."<sup>55</sup> Cities under the model are to become organizers, facilitators, information gatherers, and distributors.<sup>56</sup>

Frank's analysis of development agreements, on the other hand, argues that "concerted" efforts to involve the community in development projects can also help developers avoid some of the risks associated with "shifting political attitudes to a project."<sup>57</sup> He implies that more community involvement in a Florida development could have countered "mounting political

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<sup>53</sup> Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement, and Adaptive Planning in Land Use Decisions Installment Two*, 24 STAN. ENVTL. L.J. 269, 271 (2005).

<sup>54</sup> *Id.* at 271-72.

<sup>55</sup> *Id.* at 272.

<sup>56</sup> *Id.*

<sup>57</sup> Frank, *supra* note 27, at 244.

pressure” against the project which eventually led the zoning commission to change its mind on proposed rezoning and subsequently disavow the development agreement that had been signed between the city and the developer.<sup>58</sup>

In addition to improving the success of development projects in the long-run, authors point out that community participation in the land use decision-making process can yield more efficient results by allowing parties to lower transaction costs and promoting administrative efficiency. Various authors promote mediation models as a means of avoiding the delays and costs associated with litigation in land use disputes.<sup>59</sup> For others, community participation in development can “promote administrative efficiency” by “facilitating information gathering” and creating a “political feed-back mechanism.”<sup>60</sup>

### **C. Arguments Against Community Participation**

But despite the many reasons outlined above for encouraging community participation in land use decision making that goes beyond mere notice of zoning hearings, strong counterarguments exist. The need for cities to compete for investment dollars, costs associated with participatory processes, and the difficulty of pinning down what community participation actually means constitute only a few of those arguments. For example, in a twist to the Tiebout hypothesis, empirical evidence suggests that cities compete amongst themselves for development dollars. Tiebout’s hypothesis generally argues that city residents will lead to an efficient

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<sup>58</sup> *Id.*

<sup>59</sup> SUSSKIND ET AL., *supra* note 10, at 10.

<sup>60</sup> McFarlane, *supra* note 41, at 898.

provision of services by their city because residents will “vote with their feet” and lead cities to compete with other cities.<sup>61</sup>

Under a theory of competitive federalism, “competition among and within governments and between a government and private parties serves as a significant constraint upon the behavior of the politicians and bureaucrats who make up the government.”<sup>62</sup> Been argues that communities face competition when imposing exactions, in part, because they must compete with other municipalities in attracting developers.<sup>63</sup> She cites empirical and anecdotal evidence showing cities reducing or configuring their exactions in order to create favorable “development climate[s].”<sup>64</sup> If one analogizes local government-imposed community participation procedures to impact fees or other exactions that impose costs on developers, competitive federalism presents a reason why cities should not and will not impose time and cost-intensive community participation mechanisms on developers.

Authors alternately point to the costs associated with implementing community participation processes as a reason to avoid more robust participation. Arnold points out that persons seeking to minimize transaction costs in land development already critique the existing planning, zoning, and permitting steps that call for “highly public, participatory, and time-consuming processes.”<sup>65</sup> And Camacho, even while proposing a new “collaborative land use model,” acknowledges that

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<sup>61</sup> Been, *supra* note 4, at 514-15.

<sup>62</sup> *Id.* at 506-07. *But see* Carlson & Pollack, *supra* note 32, at 126-27 (arguing that municipalities may “behave in a less monolithic way than...Been suggests” with regards to competitive federalism pressures in that a municipality’s response to the pressures of competitive federalism may depend, in part, on the type of locality involved and the type of development it seeks).

<sup>63</sup> Been, *supra* note 4, at 510.

<sup>64</sup> *Id.* at 511-13 (discussion of empirical and anecdotal evidence showing municipalities competing with each other to create a “favorable development climate” through their choice of exactions).

<sup>65</sup> Arnold, *supra* note 10, at 455.

costs may be a challenge to adopting “institutional processes designed to facilitate collaborative land use decisionmaking.”<sup>66</sup> He also acknowledges the obvious difficulty in assessing “whether...increased costs yield better agreements.”<sup>67</sup> Indeed, McFarlane points out that the delay and disruptions inevitably linked to increased community participation require “us to look beyond instrumental justifications that are otherwise so appealing.”<sup>68</sup>

Moreover, much disagreement exists regarding what constitutes community, adequate representation of communities, and the ideal form for participation. With regards to who or what constitutes “community,” one could argue that the type of interest an individual has in a particular land use project should determine the extent of that individual’s participation in the land use approval process and thus determine membership in the “community” targeted for “community participation.” Camacho proposes, for example, that individuals’ “participatory right” in his collaborative model should depend on “the type of interest that the actor has in the project.”<sup>69</sup> He notes that “citizens with only generalized interests in a project” should be provided with various types of information, but they should “not be given extensive power over a project decision.”<sup>70</sup> Entities significantly affected, on the other hand, are to “be actively included in early scoping meetings and negotiations to identify potential issues and project alternatives.”<sup>71</sup> In addition, Camacho proposes that the more flexible the regulatory regime at issue, the more

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<sup>66</sup> Camacho, *supra* note 53, at 273.

<sup>67</sup> *Id.* at 272.

<sup>68</sup> McFarlane, *supra* note 41, at 899.

<sup>69</sup> Camacho, *supra* note 53, at 281.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 282.

“heightened” the participation should be throughout the process.<sup>72</sup> However, even if one were to accept Camacho’s framework as adequate for determining who participates and how, one would still have to ask, among other things, whether an individual’s interest in a project should be analyzed objectively or subjectively.

But Camacho’s focus on the legitimacy of an individual’s interest in the decision making process at issue is only one approach to the question of who constitutes (or should constitute) community for purposes of community participation. The literature shows a multitude of often incompatible views on who should form part of the “community” in participatory processes. Altshuler, for instance, in his 1970s discussion of power and community participation in cities, pointed to a distinction between community and neighborhoods, arguing that neighborhoods should be the focus of efforts to increase community participation in cities.<sup>73</sup>

Nevertheless, assuming one could definitively identify a group of individuals as a legitimate “community” that should engage in decision making over a specific development project, it is unclear when or how individuals associated with that group adequately *represent* the community’s interests. As Frank pointed out in his overview of CBAs, elected officials may not always constitute legitimate representatives.<sup>74</sup> The case studies in Part V sometimes reflect a similar distrust of elected neighborhood representatives in New Haven. Others have noted that community participation through CBAs, “[b]ecause of their targeted focus,...divert[s] resources...at the expense of the larger community.”<sup>75</sup> Thus, the interests of a few groups or a

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<sup>72</sup> *Id.*

<sup>73</sup> ALTSHULER, *supra* note 40, at 124-25.

<sup>74</sup> Frank, *supra* note 27, at 254. Four elected officials who signed a CBA involving the construction of a Yankee Stadium in New York are said to have had political ties to the individual responsible for managing the benefits gained through the agreement, and community groups have seen the funds managed by that individual as a ‘slush fund’ distributed “according to political favor.” *Id.*



broad coalition, even if adequately represented, could fail to represent the interests of the larger community, as a whole. Academics, like those cited here, repeatedly point to these definitional problems but eschew an attempt to systematically and broadly assess or critique how the academic literature conceives of community or representation in land use community participation.

Finally, the answer to what constitutes adequate or meaningful participation in land use decision making is no clearer than the answer to who constitutes community or legitimate representatives. Authors invoke terms like “collaborative,” “consensus,” “majority decision rule,” and “deliberation” in describing current efforts or theories to increase community participation in land use beyond the usual notice and hearing requirements for the various theoretical and practical reasons outlined above.<sup>76</sup> Some go so far as to propose specific guidelines for community participation, such as McFarlane’s three requirements also described above. However, each author generally seems to rely only on a vague notion of participation which sheds little, if any, light on the specific processes such participation should follow.

Nevertheless, while the questions of who constitutes community, who legitimately represents a community, and what community participation should entail remain ambiguous and contested, these are not questions this paper must fully resolve to examine in a useful manner the way that community participation functions in New Haven. By broadly asking how residents participate in

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<sup>75</sup> Salkin & Lavine, *supra* note 10, at 203.

<sup>76</sup> See, e.g., Camacho *supra* note 53, at 317 (“An additional challenge in implementing a collaborative model is determining whether, and in what circumstances, to require project agreements to be adopted by consensus. Some...claim that consensus ‘is not necessary because the benefits attributed to consensus-based processes can be obtained from other forms of public participation which do not revolve around a quest for consensus.’”); *Id.* (“[O]thers assert that a majority decision rule is preferable to consensus because consensus encourages holdouts and mutual vetoes that can result in the underutilization of resources.”); Salkin & Lavine, *supra* note 10, at 172 (noting how The American Planning Association’s Growing Smart Legislative Guidebook adopts a recommendation that planning “should be engaging citizens positively at all steps in the planning process, acknowledging and responding to their comments and concerns”); Arnold, *supra* note 10, at 501 (noting that “the combination of politics, social norms, statutory ‘open government’ requirements, and democratic principles put strong pressure on land use regulators to provide forums for public discussion of land use decisions and to engage in deliberative discussions.”).

the City's land use approval process, this paper aims to better understand who is participating in this process across different types of projects and neighborhoods, if community participates at all. This basic type of assessment is entirely missing from the existing literature on New Haven and little is known about the way communities participate across projects in other cities. Only by first understanding how communities actually participate and how a City crafts and understands processes for participation can one transition to a more normative discussion of how the City should structure participation processes and/or who constitutes legitimate communities and representatives in the land use context. This paper only purports to start such a conversation by undertaking a mainly positive account of what happens in New Haven and using it to better situate the city within land use trends.

#### **IV. FORMAL PROCESSES FOR COMMUNITY PARTICIPATION IN NEW HAVEN'S LAND USE APPROVAL PROCESS**

Before delving into how community participation functions in New Haven's land use approval process, it is necessary to understand the formal community participation mechanisms or requirements imposed on New Haven's planners. I begin with an examination of current federal requirements. I then analyze a variety of state land use statutes in order to better understand how they may facilitate or perhaps impede more "meaningful" community participation. With McFarlane's requirements for "meaningful" participation in mind, the succeeding discussions will generally conceive of "meaningful" participation as a means by which community groups and residents can engage in the land use approval early on and with some degree of influence or bargaining power. Finally, I examine New Haven's municipal regulations on zoning to understand how they reflect or counter state and federal laws' approach to community participation.

## A. Federal

Federal law requires community participation in the local land use approval process in two main ways. First, under Housing and Urban Development (HUD) guidelines, housing authorities must “engage in ‘meaningful’ community participation in the planning of...HOPE VI communities.”<sup>77</sup> Second, under the Supplemental Appropriations Act of 1984: Domestic Housing and International Recovery and Financial Stability Act, HUD may not authorize the “demolition or sale of any public housing unless the Housing Authority’s application ‘has been developed in consultation with tenants and tenant councils.’”<sup>78</sup> However, these requirements for meaningful participation are not defined in any real detail and scholars generally agree that they amount to relatively toothless requirements.<sup>79</sup> Indeed, these federal meaningful participation requirements are understood to represent a low point in a long history of federally mandated community participation in urban redevelopment.<sup>80</sup>

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<sup>77</sup> Georgette C. Poindexter, *Who Gets the Final No? Tenant Participation in Public Housing Redevelopment*, 9 CORNELL J.L. & PUB. POL’Y 659, 660 (2000).

<sup>78</sup> *Id.* at 664.

<sup>79</sup> *Id.* (“Although empowered by the consultation requirement, housing authorities and tenants continue to struggle with the appropriate parameters of ‘consultation.’ HUD promulgated new tenant consultation regulations in 1985, but they did not clarify the meaning of ‘appropriate tenant consultation.’”); Barbara L. Bezdek, *To Attain “The Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 57-58 (2006) (quoting McFarlane, *supra* note 41, at 870) (“The procedures of public programs invite grass-roots input in theory, but the features of such systems are subject to the critique of being solely smoke and mirrors. Federal urban policy has required cities to involve affected residents in development decisions since the community devastations of Urban Renewal in the 1950s. As a result traditional local land use planning, development and environmental management all include participatory mechanisms. In practice, however, such requirements have tended to ‘rubber stamp’ . . . [those] urban redevelopment decisions that had already been made by the local government.”).

<sup>80</sup> In the 1950s, urban renewal initially did not consult citizens unless “the aims of the more ‘efficient’ administration would also be served.” Barlow Burke, Jr., *The Threat to Citizen Participation in Model Cities*, 56 CORNELL L. REV. 751, 754 (1970-1971). However, as more citizens began to protest displacement and relocation, government began to “recognize a need for more direct participation.” *Id.* at 754. According to Burke, “[t]he War on Poverty of the mid-and late- 1960s and the establishment of the Office of Economic Opportunity (OEO) with its funding of Community Action Programs (CAP) in the various pockets of poverty throughout the country, represented a fundamental shift in outlook toward citizen participation.” *Id.* at 755. Through OEO, “participation

## B. State

Arguably, Connecticut statutes concerning project-specific land use issues like variances (as opposed to actions involving long-term planning like the development of a comprehensive plan) do little to foster meaningful community engagement and participation in the land use approval process. However, two land use-related statutes targeting low-income communities mandate unique processes that support meaningful participation in land use approval for those groups. More specifically, this section looks at state statutes regarding notice, state statutes affecting public access to zoning applications requiring zoning board or commission approval, and two other state statutes that notably affect the way communities interact with the land use approval process, namely: 1) the Revitalization Zone statute; and 2) the 2009 Environmental Justice statute.

In assessing how a basic land use statute may encourage or undermine meaningful participation, as characterized in the first part of this section, I make four assumptions: First, because residents wishing to oppose or support any type of zoning plan or development project require time to organize and/or develop a response that may require consultation with a lawyer, the more advance notice of a hearing required by statute, the greater the likelihood that residents will be able to meaningfully participate in that hearing and thus meaningfully participate in the overall process. Second, access to zoning applications by residents and neighborhood

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became an end unto itself rather than a means for bureaucrats to simplify the administration of specific programs.” *Id.* In 1966, the Demonstration Cities and Metropolitan Development Act passed, expressing a “somewhat cautious, careful concern for citizen participation and community action.” *Id.* at 760. This approach, commonly referred to as Model Cities, sought to transition from the encouragement of direct democracy in the OEO program to “one of sharing power between citizens and local government.” *Id.* at 762. In 1974, however, Model Cities and urban renewal terminated with the Housing and Community Development Act’s Community Development Block Grant program. FAINSTEIN ET AL., *RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT* 18 (Irene Rockwood, ed. Longman 1983). Like CAP and Model Cities, CDBG contained a community participation component. However, the CDBG legislation “was completely vague as to how this [community participation] process should be set up.” *Id.* at 21. Over time, “substantial compliance with the participatory mechanisms has decreased, become nominal, or ceased.” McFarlane, *supra* note 41, at 891.

representatives is important for any degree of organizing or otherwise educated and meaningful response to a particular zoning issue.<sup>81</sup> Third, the more personalized the notice required by statute, the more likely residents are to actually receive notice of a zoning application or development project and thus be able to respond in a meaningful way.

In looking at state notice of hearing requirements, the statutes generally provide notice to residents twice, but no more than two weeks prior to the required public hearing.<sup>82</sup> If one considers that organizing support or opposition of a development plan might require residents to organize community meetings, research complex land use and legal issues, and perhaps even retain counsel, two weeks seems to offer an unrealistic time frame for organizing successful

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<sup>81</sup> Indeed, in two of the four case studies examined in this paper, community residents argued before the City Plan Commission, New Haven's main zoning decision making body, as well as the Board of Aldermen, that they had not received sufficient notice of the applications at issue to gather expert testimony or otherwise fully evaluate them. In the case of the School of Management expansion, for example, Anstress Farwell, a leader of the Urban Design League, a group active around design and planning, spoke out before the City's Board of Aldermen Legislation Committee, faulting the "hearing process[,] saying she had insufficient time to organize expert witnesses. She added that changes were made which were not available to her until the hearing." In response, the committee's chairman "stated that the changes were not substantive and that the notice complied with state and local law." New Haven Board of Aldermen, Journal of the Board of Aldermen Legislation Committee 3 (Jan. 28, 2010), *available at* [http://legsvcs.cityofnewhaven.com/meetings/2010%5C1/1118\\_M\\_Legislation\\_Committee\\_10-01-28\\_Journal\\_of\\_the\\_Board\\_of\\_Aldermen.pdf](http://legsvcs.cityofnewhaven.com/meetings/2010%5C1/1118_M_Legislation_Committee_10-01-28_Journal_of_the_Board_of_Aldermen.pdf). Similarly, community members voiced concerns that neighborhood residents had not had an opportunity to review the PDD plans at issue in the Science Park development. State Rep. Gary Holder-Windfield, who lives a block away from the Science Park development asked at a City Plan Commission meeting, "If the community doesn't have the actual plans, what's the point of testifying?" Thomas MacMillan, *Amid Barbs, Winchester Project Advances*, NEW HAVEN INDEPENDENT, July 22, 2010, [http://www.newhavenindependent.org/index.php/archives/entry/winchester\\_factory\\_re-do\\_under\\_fire/](http://www.newhavenindependent.org/index.php/archives/entry/winchester_factory_re-do_under_fire/). In that case City Plan director, Karyn Gilvarg explained that the plans had "been...available for public viewing in the department's offices in City Hall." *Id.* Such a reply, in turn, prompts the question of whether even good advance availability of zoning applications and plans in City Hall offices alone, despite a neighborhood's lack of sophistication and perhaps more complicated transportation barriers, constitutes adequate access.

<sup>82</sup> Section 8-7d of the Connecticut General Statutes lays out frequently used hearing and notice requirements. Section 8-7d requires a public hearing within sixty-five days after receipt of any "formal petition, application, request or appeal" to a "zoning commission, planning and zoning commission or zoning board of appeals," which covers zoning. CONN. GEN. STAT. § 8-7d (2011). The hearing under §8-7d is generally completed within thirty-five days after it commences. *Id.* With regards to notice, §8-7d requires that notice of the hearing be published in a "newspaper having a general circulation in such municipality where the land that is the subject of the hearing is located at least twice, at intervals of not less than two days." *Id.* Under the statute, residents get no more than fifteen days notice and no less than two days notice of a hearing, although municipalities may add to these notice requirements by regulation.<sup>82</sup> Section 8-7d provides that "a zoning commission, planning commission or planning and zoning commission shall establish a public notice registry of landowners, electors, and nonprofit organizations....requesting notice."<sup>82</sup> Notice to those included in the registry must issue "not later than seven days prior to the commandment of the public hearing" on a particular action. *Id.*

support or opposition.<sup>83</sup> And while municipalities may add to the state notice requirements, it is notable that state law does not mandate notice to owners of property adjacent to a site involved in a zoning decision. In theory, the statute requires a resident to constantly scour the pages of the local newspaper for notice of upcoming hearings on proposed developments for his or her neighborhood, a seemingly high bar for even the most basic kind of participation.

With regards to access to applications or petitions for zoning changes on the part of developers, it appears that a developer could technically delay the filing of such materials with the town clerk until ten days or even fewer days prior to the required hearing, depending on the type of zoning involved.<sup>84</sup> Even if an interested resident had the sophistication to know that such materials would be available, as well as the means and expertise to get to city hall and interact with the bureaucracy there, the fact that he or she does not have a statutory right to the

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<sup>83</sup> In contrast, notice and posting (i.e. filing with the town clerk) requirements for zoning matters involving city-led, long-term planning require more advance notice and public availability of related documents. For example, §8-23 addresses the preparation, amendment or adoption of a plan of conservation and development. CONN. GEN. STAT. § 8-23 (2011). Section 8-23 requires two separate newspaper notices about a required hearing no sooner than fifteen days and no later than two days. Conn. Gen. Stat. § 8-23(g)(6) (2011). Notably, it specifies that such notice “shall make reference to the filing of [the draft plan] in the office of the town clerk.” *Id.* It also requires that the draft plan be shared with the legislative body of the municipality sixty five days prior to the public hearing by the commission. Conn. Gen. Stat. § 8-23(g)(2) (2011). Moreover, the plan must be posted on the city’s website and filed with the town clerk at least thirty five days prior to the commission hearing. CONN. GEN. STAT. § 8-23(g)(3) (2011); CONN. GEN. STAT. § 8-23(g)(5) (2011). Section 8-127 addresses the preparation and approval of redevelopment plans. It requires newspaper notice of the required public hearing at least two weeks in advance. Conn. Gen. Stat. § 8-127(b) (2011). It also requires that plans be published on a municipal website at least thirty five days before a public hearing. *Id.* Section 8-191 addresses the adoption of development plans. CONN. GEN. STAT. § 8-191 (2011). In adopting a development plan, the municipality’s development agency proposing the plan must issue newspaper notice no more than three weeks and no less than one week in advance of the hearing. Conn. Gen. Stat. § 8-191(a) (2011). The development agency must also post the plan on the city’s website, if any, at least thirty five days prior to the development agency hearing. *Id.* Certainly, the increased notice involved in these “city-led” planning issues makes sense when one considers that the city’s proposals for redevelopment, development, and other similar plans involve large-scale changes to a city’s land use policies and long-term plans. Nevertheless, they illustrate at least a few mechanisms for notice to the community that would seem to encourage more meaningful oversight or participation in contrast to the statutes applying to potentially more routine variances, site plans, exemptions, and zoning regulation changes.

<sup>84</sup> Under §8-7d, “[a]ll applications and maps and documents” relating to “any formal petition, application, request, or appeal” to a “zoning commission, planning and zoning commission, or zoning board of appeals” shall be open for public inspection.”*Id.* However, §8-7d does not specify how far in advance. *Id.* Proposed changes to zoning regulations and boundaries follows §8-7d with the additional requirement that the proposed changes must be filed with the town, city or borough clerk (or with the district clerk and the town clerk in the case of a district) “at least ten days before such hearing, and may be published in full in such paper.” CONN. GEN. STAT. § 8-3(a) (2011).

documents more than ten days in advance (and perhaps even less) could make it difficult to craft an educated response to a developer's application in time for the hearing. Communicating the plans to other community members who would be interested in a particular hearing if they knew the content of a specific developer application would also be difficult in the short amount of time guaranteed by statute between the filing of the application and hearing.

In addition, a state statute allows municipalities, by ordinance, to establish procedures for holding only one public hearing on "any application for a proposal that requires approval by more than one municipal agency, body, commission, or committee."<sup>85</sup> Use of such a statute could significantly reduce opportunities for community oversight of and engagement in the process. Rather than have multiple opportunities to learn about a particular development and perhaps form opposition along the line of multiple approvals sometimes required for zoning changes, community residents would only have one opportunity to participate in the approval process, assuming no subsequent legal challenges.

On the other hand, the state has created two other formal mechanisms for community participation that fall outside of the blanket provisions for the land use approval process and represent relatively unique and robust mechanisms for community involvement in land use decisions: 1) neighborhood revitalization zones; and 2) an environmental justice law. The Connecticut legislature authorized municipalities in 1995 to establish neighborhood revitalization zones. These zones would establish a "collaborative process for federal, state and local governments to revitalize neighborhoods where there is a significant number of deteriorated property and property that has been foreclosed, is abandoned, blighted or is substandard or poses

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<sup>85</sup>CONN. GEN. STAT. § 7-159a (2011).

a hazard to public safety.”<sup>86</sup> According to the Neighborhood Revitalization Zone Strategic Plan Guidelines issued by the Connecticut Office of Policy and Management, “[t]he main benefits of this program are related to bringing all stakeholders together to plan a neighborhood that works for all of them, by-passing “red tape” that might impede attempts to revitalize the neighborhood, and establishing a more flexible and creative government response to the needs of communities.”<sup>87</sup> Thus, the zones aim to establish community participation processes that exceed what is statutorily required in ordinary planning.

The Environmental Justice law adopted in 2009 recognizes a number of low income towns and neighborhoods throughout the state as “environmental justice communities.” Such communities are either defined by statute as a census block group of low income individuals or as a distressed municipality.<sup>88</sup> Major polluters applying for a permit from the Department of Environmental Protection or the Siting Council are required to “file a meaningful public participation plan” with the approving state council or department and obtain “approval of such plan prior to filing any application for such permit, certificate or approval.”<sup>89</sup> Moreover, such polluters must also “consult with the chief elected official or officials of the town or towns in which the affecting facility is to be located or expanded to evaluate the need for a community environmental benefit agreement.”<sup>90</sup> Thus, the statute sets up a framework that notably aims to

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<sup>86</sup> CONN. GEN. STAT. § 7-600(a) (2011).

<sup>87</sup> Conn. Office of Policy and Mgmt.: Intergovernmental Policy Division, *Neighborhood Revitalization Zone Strategic Plan Guidelines*, CT.GOV., <http://www.ct.gov/opm/cwp/view.asp?a=2985&q=383120> (last visited Apr. 25, 2011).

<sup>88</sup> CONN. GEN. STAT. § 22a-20a(a)(1) (2011).

<sup>89</sup> CONN. GEN. STAT. § 22a-20a(b)(1) (2011).

<sup>90</sup> *Id.* Community environmental benefit agreement “means a written agreement entered into by a municipality and an owner of developer of real property whereby the owner or developer agrees to develop real property that is to be used for any new or expanded affecting facility and to provide financial resources for the purpose of the mitigation,



bring in low-income community members into permitting decisions and their associated land-use processes in a deliberate and potentially meaningful way. It significantly surpasses the basic notice requirements that apply to zoning applications submitted by developers to the appropriate planning bodies.

### **C. New Haven's Local Laws**

For the most part, New Haven's regulations follow the state's requirements closely. A few instances where New Haven exceeds the state standards can be found in the following situations: 1) the alteration of zoning regulations, a process which also governs the PDD approval process; 2) the process surrounding variances; and 3) the approval process for site plans. In addition, the City has previously publicly supported CBAs and has created a Revitalization Zone.

Procedures for adopting or amending zoning regulations or maps generally follow the state hearing and notice requirements. However, they require approval by New Haven's Board of Aldermen, in addition to the usual approval by the zoning commission, which is referred to in New Haven as the City Plan Commission (CPC).<sup>91</sup> Approval at the Board of Aldermen requires a public hearing at the Legislation Committee and a separate public hearing before the full Board.<sup>92</sup> Approval of PDDs or planned development units (PDUs), flexible albeit often controversial zoning tools, occurs in the same manner as proposals for the amendment of the zoning ordinances or boundaries. But while this process adds significantly to opportunities for public hearing and participation by extending the approval process and subjecting it to the full

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in whole or in part, of impacts reasonably related to the facility, including, but not limited to impacts on the environment, traffic, parking and noise." CONN. GEN. STAT. § 22a-20a(a)(4).

<sup>91</sup> NEW HAVEN, CONN. ZONING ORDINANCES art. VII, § 64(d) (2010).

<sup>92</sup> NEW HAVEN, CONN. ZONING ORDINANCES art. VII, § 64(d) (2011); NEW HAVEN, CONN. CODE OF ORDINANCES tit. I, art. XXXI, §§183-84 (2011); Ravikumar Jayaraman, *supra* note 9, at 434-41.

city legislature, it does not set New Haven apart from other cities. The process is generally the same in other jurisdictions.<sup>93</sup>

The regulations on zoning variances add notably to the state requirements with regards to public notice. In addition to newspaper notice, the board of zoning appeals, which is responsible for variances, must notify adjacent property owners (“within and including a distance of 200 feet” from the property at issue) and aldermen of the “ward or wards in which the subject property and the properties within and including a distance of 200 feet are located” at least seven days prior to the date of the hearing.<sup>94</sup> Additionally, a sign must be posted on the subject property at least fourteen days prior to the public hearing with some minimum information regarding the hearing and sources of additional information.<sup>95</sup>

With regards to site plans, the city zoning regulations state that the CPC “may hold a public hearing regarding any site proposal if, in its judgment, the specific circumstances require such action.”<sup>96</sup> State statutes do not require public hearing for site plans that do not involve zoning changes that normally require a hearing. The local regulations also call for notice of any public hearing scheduled for a site plan, which includes a summary of the application, to “abutting property owners and property owners within 200 feet of the property borders” no more than 14 days and no less than 7 days prior to the public hearing.<sup>97</sup> Thus it goes beyond the state statute by explicitly *allowing* the CPC to hold such a hearing and making notice for such an optional

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<sup>93</sup> Ravikumar Jayaraman, *supra* note 9, at 428 (2007).

<sup>94</sup> NEW HAVEN, CONN. ZONING ORDINANCES art. VII, § 63(e) (2010). Additionally, “in cases of special exceptions involving areas of unusually large size, the board may give such reasonable notice as it may prescribe.” *Id.*

<sup>95</sup> NEW HAVEN, CONN. ZONING ORDINANCES art. VII, § 63(e)(1)(b) (2010).

<sup>96</sup> NEW HAVEN, CONN. ZONING ORDINANCES art. VII, § 64(f)(7)(c) (2010).

<sup>97</sup> NEW HAVEN, CONN. ZONING ORDINANCES art. VII, § 64(f)(7)(d) (2010).

hearing more personalized and detailed that state statute would normally require for zoning changes.<sup>98</sup>

Separately, the Board of Aldermen passed a Resolution in 2004 which encouraged CBAs. It “strongly urge[d] developers and other entities undertaking development, including but not limited to city, state and federal projects, to negotiate community benefits agreements with representative community organizations; where community benefits include but are not restricted to voluntary payments-in-lieu-of-taxes, living wage jobs, environmental safeguards, local hiring and training, direct benefits to local schools, affordable housing construction, neighborhood preservation and community stabilization, park and recreation space, residential parking and responsible contracting, charitable giving, and cultural amenities.”<sup>99</sup> However, the Resolution is now viewed as largely symbolic and responsive only to pressures in 2004 from community groups wanting a controversial cancer center development to enter into a community benefits agreement; it is not considered binding on the current Board of Aldermen.<sup>100</sup>

Finally, in 2000, New Haven created a Revitalization Zone in the West River neighborhood.<sup>101</sup> The neighborhood is an economically struggling area with a largely minority, black population.<sup>102</sup> Kevin Ewing, an organizer in the neighborhood, described the zone as a way

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<sup>98</sup> See CONN. GEN. STAT. § 8-3(g) (2010); CONN. GEN. STAT. § 8-7d (2011).

<sup>99</sup> New Haven, Conn., Resolution Encouraging Developers to Enter Into Community Benefits Agreements in Order to Enhance the Economic Viability of New Haven (July 6, 2004) (passed unanimously by the New Haven Board of Aldermen) (on file with author).

<sup>100</sup> Interview with Frances “Bitsie” Clark, Alderwoman – Ward 7, New Haven Board of Aldermen, in New Haven, Conn. (Jan. 17, 2011); Interview with Hugh Baran and Mandi Jackson, Political Organizers, UNITE HERE Locals 34, 35 & 217 Conn. & R.I., in New Haven, Conn. (Jan. 11, 2011).

<sup>101</sup> Staff, A “*Neighborhood of Choice*” Coalesces, NEW HAVEN INDEPENDENT (Feb. 24, 2009), [http://www.newhavenindependent.org/index.php/archives/entry/a\\_neighborhood\\_of\\_choice\\_coalesces/](http://www.newhavenindependent.org/index.php/archives/entry/a_neighborhood_of_choice_coalesces/).

<sup>102</sup> According to 2000 statistics, 28.3% of the West River neighborhood lives in poverty. DATAHAVEN , <http://www.ctdatahaven.org/data.php?s=1&t=2&g=258&i=367&step=3&yf=16> (last visited Apr. 25, 2011). Additionally, according to 2000 statistics, 63.8% of the neighborhood population is African American.

to bring development of the area “in-house,” meaning that neighborhood residents could develop their own planning process.<sup>103</sup> Despite attempts to develop the area, however, Ewing notes that little has occurred since the City established the Zone.<sup>104</sup>

Thus, New Haven’s local notice requirements exceed the state requirements (albeit not dramatically by any means) in at least three ways. First, New Haven’s requirements for amending zoning text/maps and forming PDDs or PDUs stand add significantly to the state requirements for notice and hearings in the land use approval process. Second, the City surpasses the state’s minimum notice requirements by requiring personalized notice required for variances, as well as a sign visible to residents passing by a property asking for a variance. Third, the City exceeds the state minimum requirements by allowing public hearings for site plans and requiring more detailed notice. Outside of notice requirements, the City has shown interest in supporting a planning process that goes even beyond making notice requirements slightly better by voicing support for CBAs and by voluntarily creating a Revitalization Zone. On the other hand, New Haven’s requirements for changing zoning text or maps (including PDD applications) do not stand out when compared to cities across the nation generally. Its resolution in support of CBAs is now only a symbolic gesture of the past. And finally, the main formal process by which New Haven sets itself apart and perhaps ahead of other cities when it comes to community participation, the Revitalization Zone, is a voluntary, state-created process that at least one community organizer claims has not accomplished much, if anything, in the last ten years. And

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DATAHAVEN, [http://www.ctdatahaven.org/data.php?s=1&t=2&g=258&i=270&step=3&y\[\]=16](http://www.ctdatahaven.org/data.php?s=1&t=2&g=258&i=270&step=3&y[]=16) (last visited Apr. 25, 2011).

<sup>103</sup> Interview with Kevin Ewing, Community Organizer and New Haven Econ. Dev. Comm’r., in New Haven, Conn. (Dec. 13, 2010).

<sup>104</sup> *Id.*

although some cities across the nation have begun to craft local ordinances specifically promoting increased or meaningful participation, New Haven lacks any such laws.<sup>105</sup>

## **V. FOUR CASE STUDIES**

The following section aims to create something of a snapshot of community participation in New Haven's land use approval process. Early interviews with city planners and development officials indicated that the city views community participation in projects differently depending on the extent to which a particular development is considered public or private.<sup>106</sup> In general, a city owned and developed property will prompt planners and officials to engage the community more proactively than a purely privately owned and developed project. The case studies selected cover the scale between those extremes through: 1) a public development (the Worthington Hooker school expansion); 2) a public-private development (Science Park); and 3) a private development (the Yale School of Management expansion, albeit the owner Yale constitutes an unusual private owner as a repeat and highly visible community player). The fourth case study also fits into the "private" category, but it was mainly chosen because it represents the first time New Haven has dealt with the 2009 state Environmental Justice statute that aims for more meaningful community participation when major polluters seek to expand their facilities.

Additionally, and perhaps notably for some, this paper does not examine the 2006 CBA signed between the City and the Yale- New Haven Cancer Center, New Haven's first CBA. Much has been written on the 2006 CBA. For example, articles have examined the role of labor,

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<sup>105</sup>Salkin & Lavine, *supra* note 10, at 216 n.63 (noting a number of statutory approaches to achieving a more collaborative and inclusive planning process, including a requirement in the State of Washington for cities and counties that plan under the Growth Management Act to establish and disseminate a public participation program).

<sup>106</sup> Interview with Karyn Gilvarg, Executive Dir., City of New Haven City Plan Dep't., in New Haven, Conn. (Dec. 8, 2010); Interview with Tony Bialecki, Deputy Dir. of Econ. Dev., City of New Haven Econ. Dev. Admin., in New Haven, Conn. (Dec. 3, 2010).

the difficulties enforcing the terms of the agreement, and the fact that community groups did not sign onto the agreement, making their ability to challenge subsequent actions by the signatories more difficult.<sup>107</sup> But this paper did not want to risk focusing too much on a development that may have ultimately represented a complete outlier in terms of how community normally participates in the land use approval process. Instead, it sought to look beyond the 2006 CBA to provide a more complete and current picture of community participation in New Haven's land use approval process.

Although each case study will gradually introduce individual actors, neighborhoods, and city departments, understanding the basic function of the following entities will help one navigate the subsequent case studies:

- 1) **The City Plan Department (CPD):** In general, the CPD is comprised of planners “hired by the mayor who play an advisory role to the City Plan Commission (CPC) on technical planning and zoning matters.”<sup>108</sup>
- 2) **City Plan Commission (CPC):** The CPC is “comprised of six voting laypeople—one elected representative from the Board of Aldermen, four permanent mayoral appointees, and one of the three appointed alternates who rotate to fill the final slot.” Members are usually “selected according to political favor based on the mayor's, an alderman's, or the CPD's suggestion.”<sup>109</sup>

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<sup>107</sup> See e.g., Simmons & Luce, *supra* note 8; Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011); Salkin & Lavine, *supra* note 26; Chris Rhomberg & Louise Simmons, *Beyond Strike Support: Labor-Community Alliances and Democratic Power in New Haven*, LABOR STUDIES JOURNAL, Fall 2005, at 21.

<sup>108</sup> Ravikumar Jayaraman, *supra* note 9, at 429.

<sup>109</sup> *Id.* at 434.

- 3) **The Economic Development Administration (EDA):** The EDA generally works to attract development to the city, assist developers “in identifying funding sources, making applications to public and private lenders, and complying with regulatory, statutory, or other permitting requirements,” and secure federal and state grants for economic development.<sup>110</sup>
- 4) **The Board of Aldermen:** The Board of Aldermen is the City’s legislative and elected body comprised of 30 aldermen representing 30 wards.<sup>111</sup>
- 5) **Community Management Teams:** Community Management Teams “are organized in each of New Haven’s ten community policing districts.” The Teams consists of residents and businesses interested in tackling neighborhood problems and addressing neighborhood issues. They are intended to help “residents have a voice in neighborhood improvement and revitalization efforts and are an important link to the police and to other city and social service agencies.”<sup>112</sup> The groups meet monthly with police officers and other officials at police substations.<sup>113</sup> Members are volunteers and do not have formal power in land use decision making or other areas.<sup>114</sup>

#### **A. The Worthington Hooker School Expansion**

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<sup>110</sup> NEW HAVEN, CONN. CODE OF ORDINANCES tit. III, ch. 21, art. V, § 21-32 (2011); *See also* Interview with Tony Bialecki, *supra* note 106.

<sup>111</sup> NEW HAVEN, CONN. CODE OF ORDINANCES tit. I, art. IX, § 37 (2011).

<sup>112</sup> DATAHAVEN, [http://www.ctdatahaven.org/know/index.php/New\\_Haven\\_Community\\_Management\\_Teams](http://www.ctdatahaven.org/know/index.php/New_Haven_Community_Management_Teams) (last visited Apr. 25, 2011).

<sup>113</sup> Allan Appell, *Management Teams Seek More of a Say*, NEW HAVEN INDEPENDENT (Nov. 11, 2010), [http://www.newhavenindependent.org/index.php/archives/entry/cmt\\_story/](http://www.newhavenindependent.org/index.php/archives/entry/cmt_story/).

<sup>114</sup> *Id.*

In January 2010, a new Worthington Hooker school located on 691 Whitney Avenue in the East Rock neighborhood was formally dedicated. The East Rock neighborhood, a predominantly white area, is considered one of New Haven's wealthiest neighborhoods.<sup>115</sup> Plans for the school's expansion on that site started almost ten years prior to that, however. It was only after a long and winding path involving a "leaked" map from a closed meeting between school parents and school officials, an intense site selection period involving collaboration between city planners and neighborhood residents, a contentious process to approve a PDD for the chosen site, an abandonment of the approved PDD application in favor of a zoning ordinance and map amendment, and a lawsuit challenging those amendments ending in the Connecticut Supreme Court that the school expansion succeeded.

In tracing the school's land use approval process, this case study focuses on the nature and extent of community involvement at the various stages. The case ultimately shows a highly sophisticated and wealthy neighborhood using a wide range of organizing and legal tools to shape an ad hoc process with substantial room for community engagement that seemingly bordered on control at times. Thus, the process led not simply to participation, but what one might term *highly* meaningful participation. The Worthington Hooker school expansion also demonstrates how the City may approach community participation when the development is clearly city-owned and implemented.

## 1. The Leaked Flyer and Site Selection Process

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<sup>115</sup> According to 2000 statistics, 72.1% of East Rock residents are white. DATAHAVEN, [http://www.ctdatahaven.org/data.php?s=1&t=2&g=249&i=271&step=3&y\[\]=16](http://www.ctdatahaven.org/data.php?s=1&t=2&g=249&i=271&step=3&y[]=16). For a comparison of the East Rock neighborhood to its neighboring Newhallville neighborhood, see Melissa Bailey, *Home Invasion Unnerves East Rock*, NEW HAVEN INDEPENDENT (Apr. 30, 2008), [http://newhavenindependent.org/archives/2008/04/woman\\_beaten\\_in.php](http://newhavenindependent.org/archives/2008/04/woman_beaten_in.php) ("Loomis Place [in East Rock] lies between one of the city's wealthiest areas and, just over the hill, Newhallville's Winchester Avenue, where shootings and drug deals are common."). See Appendix A for a map of the neighborhood.



In 1998, the City of New Haven initiated an ambitious school construction program to renovate existing schools and build several new ones.<sup>116</sup> By 2000, parents at the existing but old and “out-of-code” Worthington Hooker school (Hooker) began to pressure the Board of Education to consider expanding and renovating their school even though it was not scheduled until a later phase of the school construction project.<sup>117</sup> As a result of this pressure, several parents were able to meet with representatives from Gilbane, the construction company managing the school construction program, city officials, and neighbors.<sup>118</sup> However, an anonymous flyer was distributed in the East Rock neighborhood after these meetings, stirring alarm by “warning that a proposed expansion would require taking down five to seven historic homes” in the area.<sup>119</sup> In response to the “hue and cry” that followed,<sup>120</sup> the mayor expressed a commitment to not take any homes. A planning committee comprised of parents, neighbors,<sup>121</sup> and elected officials emerged to tackle the issue.<sup>122</sup>

The planning committee proceeded to distribute a “detailed, five-page survey” to 2,000 households registered to vote in the 9<sup>th</sup>, 10<sup>th</sup>, and 19<sup>th</sup> wards.<sup>123</sup> Approximately five hundred residents responded. Among other questions, it asked residents to rank several proposed

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<sup>116</sup> NEW HAVEN SCHOOL CONSTRUCTION, <http://nhs.chilmarktech.com/DesktopDefault.aspx> (last visited Apr. 22, 2011).

<sup>117</sup> Interview with Karyn Gilvarg, *supra* note 6.

<sup>118</sup> *Id.* (Gilbane met with parents).

<sup>119</sup> *Group Blasts Hooker Panel*, NEW HAVEN REGISTER, May 16, 2001.

<sup>120</sup> Interview with Karyn Gilvarg, *supra* note 6.

<sup>121</sup> *Group Blasts Hooker Panel*, NEW HAVEN REGISTER, May 16, 2001.

<sup>122</sup> Natalie Missakian, *Group Ditches Idea to Demolish Homes Near School*, NEW HAVEN REGISTER, Jan. 6, 2001.

<sup>123</sup> Natalie Missakian, *Residents Favor Split Sites for Hooker School*, NEW HAVEN REGISTER, Dec. 14, 2000.

locations for an expansion of the Hooker school.<sup>124</sup> A flurry of meetings then took place throughout 2001. At least three subcommittee meetings were held between mid-May and early June, for example. Advance (and even multiple) notices for the subcommittee and community-wide meetings during this period appeared in the New Haven Register, the City's principal newspaper.<sup>125</sup> Coverage of these meetings highlights participants' level of engagement early on with questions of representation, process, and accountability. For example, some pushed back on the subcommittee, alleging that it had not formally notified residents about its meetings. At a May 2001 meeting, the president of the Ronan-Edgehill Neighborhood Association, an area potentially affected by proposed sites, stressed that the subcommittee had to "make sure people are not handpicked to favor certain points of view."<sup>126</sup> Additionally, he argued that the subcommittee in calling itself a 'public body' should be prepared "to follow rules of the state Freedom of Information Commission" and "defend" what it was doing in front of that commission.<sup>127</sup> And apart from the debates occurring at public meetings, residents also engaged in a vigorous public debate through the New Haven Register over the legitimacy of the subcommittee, procedures for decision-making, notice, the line between deliberation and consensus, and the distinction between public and private mechanisms for community engagement.<sup>128</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Group Blasts Hooker Panel*, NEW HAVEN REGISTER, May 16, 2001; No author (import), *Worthington Hooker Middle School Panel Selects Three More Potential Sites*, NEW HAVEN REGISTER, May 24, 2001; *Meeting on Site for School Tuesday*, NEW HAVEN REGISTER, June 2, 2001.

<sup>126</sup> *Worthington Hooker Middle School Panel Selects Three More Potential Sites*, NEW HAVEN REGISTER, May 24, 2001

<sup>127</sup> *Id.*

<sup>128</sup> *See also* Letter to the Editor, *Citizen Panel Cannot Hide City Business*, NEW HAVEN REGISTER, June 19, 2001 (criticizing the decision-making process of the planning subcommittee, wanting "fair representation, due notice of

## 2. City Plan Steps In

After more than six months of deliberation at the planning subcommittee, the CPD stepped into the discussion with its own report. In preparation for this intervention of sorts, the CPD had set criteria for choosing sites, and aimed to consider practically any suggestion that fit within that gross criteria.<sup>129</sup> The CPD report ultimately assessed twenty potential sites. But according to Karyn Gilvarg, head of the CPD, the report was admittedly not very analytic. The department believed it would make more sense to simply present all the relevant information to the neighborhood's highly educated residents and "let them parse through it."<sup>130</sup> City officials presented the report at a Hooker School meeting on January 9, 2002.<sup>131</sup> Not surprisingly, the City's report concluded, as the neighborhood had, that there was "no ideal spot" for the school expansion.<sup>132</sup>

Following the public meeting at which the CPD presented its assessment of approximately twenty potential sites, a meeting at the CPC was scheduled to arrive at a final recommendation. Another flurry of newspaper articles and letters to the editor shows more debate about public participation and the decision making process. Residents discussed, for

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meetings, and access to the records of its proceedings"); Natalie Missakian, *Residents Surprised by School Expansion*, NEW HAVEN REGISTER, July 26, 2001 (quoting a resident attorney arguing that "[t]here's a fatal flaw in the [Hooker expansion decision-making] process" because "[u]ltimately, someone's got to come to consensus and you're not going to come to consensus"); Letter to the Editor, *Hooker School 'chaos' Result of Ignoring Formal Process*, NEW HAVEN REGISTER, Nov. 20, 2001 (stating that the 'chaotic' process for addressing the Hooker expansion "might have been avoided had the responsibility for sites for the Hooker school been entrusted to a School-Based Building Advisory Committee that would have conducted its review in an open and public manner, provided advanced public notice..., included all of the taxpayers and residents of the neighborhood in the deliberative process, and taken their views into account in its deliberations").

<sup>129</sup> Interview with Karyn Gilvarg, *supra* note 6.

<sup>130</sup> *Id.*

<sup>131</sup> *Konigsberg v. Board of Aldermen of City of New Haven*, 283 Conn. 553, 560 (2007).

<sup>132</sup> Natalie Missakian, *City Hall Will Seek Site for School*, NEW HAVEN REGISTER, Dec. 13, 2001.

instance, the nature and value of the city planners' expertise and, again, whether there had been adequate notice of 2001 subcommittee meetings.<sup>133</sup> Approximately 150 residents attended the February 6, 2002 CPC hearing and approximately forty signed up to speak.<sup>134</sup> And by that point, opponents had hired "an attorney, traffic consultant and home appraiser."<sup>135</sup> On March 20, 2002, the CPC officially recommended building the Hooker school at 691 and 703 Whitney Avenue on property "owned by both the Whitney Life Church and the American Red Cross."<sup>136</sup>

By November 2003, more than a year after the CPC approval, the purchase of the Whitney Avenue Church property<sup>137</sup> had been approved by the Citywide School Building Committee, the Board of Education, and the Board of Aldermen.<sup>138</sup> The Parent Teacher Organization submitted more than 250 signatures in support of the purchase at the Board of Aldermen meeting, in addition to the more than 90 letters of support submitted by other interested parties.<sup>139</sup> More than sixty parents and residents attended that final Board of Aldermen decision.<sup>140</sup> Additionally, regular letters to the editor in addition to other articles submitted by

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<sup>133</sup> See, e.g., Letter to the Editor, *Hooker Planners Chucked Survey*, NEW HAVEN REGISTER, Feb. 5, 2002; David Cameron, Letter to the Editor, *Wider Input on Hooker Welcome*, NEW HAVEN REGISTER, Jan. 12, 2002.

<sup>134</sup> William Kaempffer, *Hooker PTO Backs School Site Selection*, NEW HAVEN REGISTER, Feb. 7, 2002.

<sup>135</sup> *Id.*

<sup>136</sup> Natalie Missakian, *New School Site Proposed on Whitney Avenue*, NEW HAVEN REGISTER, Mar. 22, 2002.

<sup>137</sup> The City Plan Commission determined that the Red Cross property "had been determined to be unavailable due to American Red Cross' federal charter." *Konigsberg v. Board of Aldermen of City of New Haven*, 283 Conn. 553, 560 (2007).

<sup>138</sup> Mark Zaretsky, *Panel Picks New School Site*, NEW HAVEN REGISTER, Apr. 12, 2002 (noting the Citywide School Building Committee approved the Whitney Avenue site); Joseph Straw, *School Board OKs Hooker Expansion*, NEW HAVEN REGISTER, May 14, 2002 (reporting the Board of Education approved the Whitney Avenue site); Angela Carter, *City Aldermen Vote to Buy Church*, NEW HAVEN REGISTER, Nov. 7, 2003 (reporting the Board of Aldermen approved purchase of the Whitney Avenue Church property for \$1.7 million). See also *Konigsberg v. Board of Aldermen of City of New Haven*, 283 Conn. 553, 560 (2007).

<sup>139</sup> Angela Carter, *City Aldermen Vote to Buy Church*, NEW HAVEN REGISTER, Nov. 7, 2003.

<sup>140</sup> *Id.*

supporters and opponents continued to pepper the pages of the New Haven Register between the expansion's approval at the CPC and Board of Aldermen.<sup>141</sup>

### 3. The Abandoned Planned Development District (PDD)

After the Board of Aldermen approval of the Whitney site, though, another battle was yet to begin with the City's PDD application for the site. PDDs, as previously mentioned, are a flexible zoning tool. They are used to create a "specially tailored zoning district...upon application by the landowner for a large parcel of land."<sup>142</sup> As Ravikumar Jayaraman stated in her study of New Haven's PDD process, the "device makes large-scale land uses--hospitals, apartment buildings, company offices, schools, a community of beach houses--possible where underlying zoning did not envision them."<sup>143</sup> In this case, the PDD application on the part of the City came into play because the purchased site at 691 Whitney Avenue was split-zoned. The eastern side of the parcel abutting Everit Street was zoned as residential single family (RS-1).<sup>144</sup> The western side of the parcel abutting Whitney Avenue was zoned as residential high-density (RH-1).<sup>145</sup>

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<sup>141</sup> See, e.g., Paulette Cohen, Letter to the Editor, *Ruining Everit for New School Hard to Fathom*, NEW HAVEN REGISTER, May 16, 2002; David R. Cameron, *Drawbacks Abound for 691 Whitney Ave. as School Location*, NEW HAVEN REGISTER, July 10, 2003 (Article identifies David Cameron as an East Rock neighborhood resident); Matthew Nemerson, *Location Was the Only Suitable Choice*, NEW HAVEN REGISTER, Oct. 10, 2003 (Article identifies Matthew Nemerson as the Vice President of the Worthington Hooker Parent Teacher Organization); David R. Cameron, *School Plan Again is Counter to City's Interests*, NEW HAVEN REGISTER, Nov. 5, 2003 (Article identifies David Cameron as a professor of political science at Yale University); Letter to the Editor, *Other Church Properties Better Suited for Hooker*, NEW HAVEN REGISTER, Nov. 6, 2003.

<sup>142</sup> Ravikumar Jayaraman, *supra* note 9, at 419.

<sup>143</sup> *Id.*

<sup>144</sup> *Konigsberg v. Board of Aldermen of City of New Haven*, 283 Conn. 553, 561-63 (2007).

<sup>145</sup> *Id.*

In order to approve the construction of a school on the site, the city sought to rezone the parcel as a PDD.<sup>146</sup> The CPC hearing on the PDD application in October 2004 saw opponents and supporters of the PDD turn out in “vocal force.”<sup>147</sup> A group of about 50 opponents had hired a lawyer, and they were quoted threatening legal action.<sup>148</sup> One stated that she did not think the CPC would listen to them and that she thought it “‘w[ould] all be lawyers.’”<sup>149</sup> Another “warned that running fast and loose with zoning regulations could violate city law.”<sup>150</sup> Indeed, supporters “shot back at opponents” for using “zoning issues as a ‘pretense’ for striking down the plan.”<sup>151</sup> The CPC permitted five hours of public comments pertaining to the plan at the hearing,<sup>152</sup> but despite vocal opposition, the CPC approved the PDD and recommended it to the Board of Aldermen.<sup>153</sup>

#### **4. A Zoning Ordinance and Map Amendment**

Before the Board of Aldermen could address the Whitney Avenue PDD, however, the state Court of Appeals invalidated the PDD tool in another lawsuit.<sup>154</sup> The Board of Education rescinded its PDD application. In its place, the CPD submitted applications for a proposed

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<sup>146</sup> *Id.* at 565.

<sup>147</sup> William Kaempffer, *City Residents Still Up in Arms On School Site*, NEW HAVEN REGISTER, Oct. 7, 2004.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Andy Bromage, *Hooker School Plan Headed to Board of Aldermen*, NEW HAVEN REGISTER, Oct. 24, 2004.

<sup>153</sup> *Id.*

<sup>154</sup> *Konigsberg v. Board of Aldermen of City of New Haven*, 283 Conn. 553, 567 (2007) (citing *Campion v. Board of Aldermen*, 85 Conn.App. 820, 853, 859 (2004)).

amendment to the zoning ordinance and map that would permit the school construction.<sup>155</sup> At the CPC hearing on the amendments on March 23, 2005, an attorney for the board of education testified, as did “approximately thirty-eight members of the community,” including a lawyer and expert for opponents.<sup>156</sup>

On April 6, 2005, the CPC approved the amendments four to zero with one member abstaining.<sup>157</sup> A public hearing on the amendments at the Board of Aldermen’s Joint Committee on Community Development and Legislation then took place on April 11, 2005.<sup>158</sup> In response to the CPD’s recommendations after its hearing, the proposed amendments before the aldermen included a modification of the proposed language on parking provisions; a “savings clause specifying that the zoning ordinance would remain in full force and effect except as amended; and new language specifying when the amendment would go into effect.<sup>159</sup> But by that point, opponents seem to have left the public forum and process in favor of litigation. On May 16, 2005, the full Board voted on the amendments. Twenty-three members voted in favor, three abstained, and none opposed.<sup>160</sup>

## **5. The Legal Fight**

Opponents filed a lawsuit challenging the Board of Aldermen’s decision on June 28, 2005. After the CPC later approved a site plan regarding the school construction, an appeal of

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<sup>155</sup> *Id.* at 570 (“On February 1, 2005, Karyn Gilvarg, the executive director of the plan department submitted applications for the proposed amendments to the board of aldermen.”).

<sup>156</sup> *Id.* at 572.

<sup>157</sup> *Id.* at 573.

<sup>158</sup> *Id.* at 574.

<sup>159</sup> *Konigsberg v. Bd. of Aldermen of City of New Haven*, 283 Conn. 553, 574-75 (2007).

<sup>160</sup> *Id.* at 575.

that decision was later consolidated with the original appeal of the Board of Aldermen's decision on the amendments.<sup>161</sup> In fact, no opponents testified against the site plan approval.<sup>162</sup> The Superior Court judge ruled in favor of the opponents, finding that "the amendments were not consistent with the city's comprehensive plan."<sup>163</sup> An appeal of the superior court's decisions on the amendments and site plan were transferred and consolidated to the Connecticut Supreme Court.<sup>164</sup> The state Supreme Court found that the trial court should not have overturned the CPC's decision.<sup>165</sup>

Ultimately, the process that developed after the "leaked flyer" was entirely ad hoc, and the head of the CPD recognizes it as such.<sup>166</sup> It allowed for approximately six months of deliberation amongst residents and between city officials and residents prior to any major decision. In what constitutes a rather stunning informal mechanism for community participation, residents were able to get the CPD to virtually work for them in drafting a report that assessed any feasible suggestions for a school site. In addition, newspaper notice, both through stand alone announcements and discussions in countless articles and editorials about upcoming meetings, went far beyond what the land use statutes previously discussed require. The case also shows residents going to lawyers early on in the process before any hearings on-the-record; coverage of the hearings shows lawyers and threats of legal action featuring prominently at those hearings. Throughout the entire process, residents showed a sophisticated understanding of

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<sup>161</sup> *Id.* at 577-78.

<sup>162</sup> *Id.* at 578.

<sup>163</sup> *Id.* at 580. The comprehensive plan had been adopted on October 15, 2003. *Id.* at 569.

<sup>164</sup> *Konigsberg v. Bd. of Aldermen of City of New Haven*, 283 Conn. 553, 557 (2007).

<sup>165</sup> *Id.* at 597.

<sup>166</sup> Interview with Karyn Gilvarg, *supra* note 6. Additionally, Gilvarg expressed no concern or discomfort with this ad hoc process. *Id.*



zoning law as well as relevant state law. Indeed, apart from invoking the Freedom of Information Act, for example, some opponents of the Whitney Avenue site even helped to successfully lobby for a state statute on PDDs that sets more stringent standards only for New Haven.<sup>167</sup>

## **B. The Science Park Development**

Around 2007, a large scale development project began in the Science Park industrial area of New Haven which neighbors the Newhallville and Dixwell neighborhoods. In stark contrast to the East Rock neighborhood involved in the Hooker school expansion, Newhallville and Dixwell are characterized by high rates of poverty and a predominantly African American population.<sup>168</sup> The development involves the construction of a parking garage for over 1,000 cars as well as the conversion and renovation of an abandoned factory into a mixed used space offering office space, apartments, and some retail. Two developers have been involved in the current development: Winstanley Enterprises (Winstanley) and Forest City Enterprises (Forest City). These recent developments have been referred to as the Winchester or Science Park development. This paper will use these terms interchangeably.

Overall, the development's close relationship with the Science Park Development Corporation (SPDC), a public-private entity, renders the project relevant for understanding how the city may view and develop community participation processes, as well as how developers

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<sup>167</sup> Melissa Bailey, *PDD Power Play*, NEW HAVEN INDEPENDENT (Nov. 10, 2006), [http://www.newhavenindependent.org/index.php/archives/entry/pdd\\_power\\_play/](http://www.newhavenindependent.org/index.php/archives/entry/pdd_power_play/) (David Cameron, an active opponent of the Whitney Avenue site, formed part of the lobbying effort to pass the state PDD law); Conn. Gen. State. § 8-2m (2011).

<sup>168</sup> According to 2000 statistics, 19.9% of Newhallville and 24.85 of Dixwell residents live in poverty. DATAHAVEN, [http://www.ctdatahaven.org/data.php?s=1&t=2&g=243\\_244\\_245\\_246\\_247\\_248\\_249\\_250\\_251\\_252\\_253\\_254\\_255\\_256\\_257\\_258\\_259\\_260\\_261&i=367&step=3&y\[\]=16](http://www.ctdatahaven.org/data.php?s=1&t=2&g=243_244_245_246_247_248_249_250_251_252_253_254_255_256_257_258_259_260_261&i=367&step=3&y[]=16) (last visited Apr. 23, 2011). 73.7% of Dixwell and 93.1% of Newhallville residents are African American according to 2000 statistics. DATAHAVEN, [http://www.ctdatahaven.org/data.php?s=1&t=2&g=246\\_255&i=270&step=3&y\[\]=16](http://www.ctdatahaven.org/data.php?s=1&t=2&g=246_255&i=270&step=3&y[]=16) (last visited Apr. 27, 2011). See also Melissa Bailey, *Home Invasion Unnerves East Rock*, NEW HAVEN INDEPENDENT (Apr. 30, 2008), [http://newhavenindependent.org/archives/2008/04/woman\\_beaten\\_in.php](http://newhavenindependent.org/archives/2008/04/woman_beaten_in.php).

and communities may shape such participation, when a public-private entity such as SPDC is involved. In addition, the project's proximity to and impact on the Newhallville and Dixwell neighborhoods offers insight into how community participation may function in an area generally considered low-income and minority.<sup>169</sup>

## **1. The Science Park Development Corporation and Developers**

The SPDC was founded in 1981 as a partnership between Yale University, the City of New Haven, and the Olin Corporation, which had operated an arms manufacturing facility in the 80-acre industrial site known as Science Park.<sup>170</sup> The SPDC's goal is to redevelop the large industrial complex and "re-purpose the buildings and sites for new commercial and light industrial uses."<sup>171</sup> Additionally, the Science Park complex is part of a Municipal Development Plan<sup>172</sup> established in 1981, a Planned Development District approved in 1983, and the Newhallville Renewal and Redevelopment Plan.<sup>173</sup> The ownership structure of the various parcels of land in Science Park is complex: parcels are owned by Yale University, SPDC, and private owners. SPDC also leases much of the property to private companies like Winstanley.

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<sup>169</sup> See Appendix B and Appendix C for a map showing the Newhallville and Dixwell neighborhoods.

<sup>170</sup> Science Park Development Corporation, Request for Qualifications For the Development of Science Park, Tract A 3 (2007), available at [http://www.cpstn.com/files/SPDC\\_RFQ.pdf](http://www.cpstn.com/files/SPDC_RFQ.pdf) [hereinafter Request for Qualifications].

<sup>171</sup> New Haven City Plan Commission, New Haven City Plan Commission Advisory Report #1442-09 at 2 (submitted for consideration at July 21, 2010 City Plan Commission meeting) (on file with the New Haven City Plan Department).

<sup>172</sup> Under Chapter 132 of the Connecticut General Statutes, municipalities through a designated development agency may design development plans to generally promote the growth of industry and business in the state. The plans are effective for ten years and may be reapproved. See CON. GEN. STAT. §§ 8-186 -8-200B (2011).

<sup>173</sup> New Haven City Plan Commission, New Haven City Plan Commission Advisory Report #1442-09 at 2 (submitted for consideration at July 21, 2010 City Plan Commission meeting) (on file with the New Haven City Plan Department). "The objectives of the Redevelopment Plan are to remove blight, rehabilitate the commercial properties....not slated for demolition and improve the quality of and provide new housing and pubic [sp] facilities in the area..." *Id.* at 10.

The City's control or direct involvement in Science Park is also difficult to pinpoint. Kelly Murphy, the City's Economic Development Administrator, is a board member of the SPDC.<sup>174</sup> Other members include at least one neighborhood resident and a Yale representative.<sup>175</sup> The recent ownership transfers of Parcel K, part of the Science Park complex, illustrates the complex and somewhat blurry ownership structure. Until February 2010, the City owned Parcel K. At that time, the City transferred its title to this parcel to SPDC which then entered into a Memorandum of Understanding with Winstanley to develop a day care center on the site.<sup>176</sup>

The developments referred to in this paper as the Winchester or Science Park developments refer to the main developments occurring in the Science Park area between 2007 until late 2010. More specifically, this case study focuses on the community participation accompanying the following large-scale projects: 1) the building of a parking garage with retail at 276 Winchester Avenue by Winstanley under a long-term lease to a Winstanley affiliate by SPDC; 2) the rehabilitation of 344 Winchester Avenue, an old gun factory, into offices and parking by Winstanley under a ground lease to a Winstanley affiliate by SPDC; and 3) the rehabilitation of 275 Winchester Avenue, old factory buildings to be converted into a mix of retail and offices, through a partnership between Winstanley and Forest City under a long-term lease for the site issued by SPDC.<sup>177</sup> The development of the site at 275 Winchester had

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<sup>174</sup> Paul Bass, *Hush-Hush Sci Park Sale Irks City*, NEW HAVEN INDEPENDENT (Feb. 7, 2007), [http://www.newhavenindependent.org/index.php/archives/entry/hush-hush\\_sci\\_park\\_sale\\_irks\\_city/](http://www.newhavenindependent.org/index.php/archives/entry/hush-hush_sci_park_sale_irks_city/).

<sup>175</sup> Interview with Roxanne Condon, Former Chair, Newhallville Mgmt. Team, in New Haven, Conn. (Jan. 20, 2011).

<sup>176</sup> New Haven City Plan Commission, New Haven City Plan Commission Advisory Report #1442-09 at 5 (submitted for consideration at July 21, 2010 City Plan Commission meeting) (on file with the New Haven City Plan Department).

<sup>177</sup> New Haven City Plan Commission, New Haven City Plan Commission Advisory Report #1442-09 (submitted for consideration at July 21, 2010 City Plan Commission meeting) (describing ownership structure of SPDC sites) (on file with the New Haven City Plan Department); Melissa Bailey, *Winchester Factory Gets 2<sup>nd</sup> Chance*, NEW HAVEN INDEPENDENT (Feb. 3, 2010),

originally been awarded to Forest City around February 2008,<sup>178</sup> but the two developers partnered to rehabilitate that site in early 2010.<sup>179</sup>

## **2. Developers Enter the Newhallville and Dixwell Neighborhoods.**

In May 2008, Winstanley appeared before the CPC to address an application for a Site Plan Review, a minor modification to the PDD General Conditions, and a Special Permit, all of which concerned the parking garage planned for 276 Winchester Avenue. The property “is owned by two SPDC affiliates and is ground leased to a Winstanley affiliate.”<sup>180</sup> Approximately 30 individuals attended the meeting (apart from city staff and commissioners), and the CPC approved all three applications. More importantly for this paper’s analysis, the minutes of the mandatory CPC hearing associated with the Special Permit reveal details regarding the developer’s outreach to the community prior to the CPC hearing.

Both Winstanley and residents present at the CPC meeting repeatedly addressed the issue of community engagement. Notably, Carter Winstanley’s introduction summarized his eleven years of involvement in New Haven and stated that he had met with “the tenants, management

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[http://www.newhavenindependent.org/index.php/archives/entry/winchester\\_factory/](http://www.newhavenindependent.org/index.php/archives/entry/winchester_factory/) (announcing partnership between Winstanley and Forest City to develop 275 Winchester Avenue after Forest City had attempted to develop the site independently). The property at 276 Winchester Avenue forms part of Parcel G of the Science Park complex; 344 Winchester Avenue constitutes Parcel D of the Science Park complex; and 275 Winchester Avenue constitutes Parcel L of the complex. New Haven City Plan Commission, New Haven City Plan Commission Advisory Report #1442-09 at 5-6 (submitted for consideration at July 21, 2010 City Plan Commission meeting) (describing ownership structure of SPDC sites) (on file with the New Haven City Plan Department). See Appendix D for a map of the Science Park development discussed here.

<sup>178</sup> Melissa Bailey, *Science Park Chooses Preferred Developer*, NEW HAVEN INDEPENDENT (Feb. 15, 2008), [http://www.newhavenindependent.org/index.php/archives/entry/science\\_park\\_chooses\\_preferred\\_developer/](http://www.newhavenindependent.org/index.php/archives/entry/science_park_chooses_preferred_developer/).

<sup>179</sup> Melissa Bailey, *Winchester Factory Gets 2<sup>nd</sup> Chance*, NEW HAVEN INDEPENDENT (Feb. 3, 2010), [http://www.newhavenindependent.org/index.php/archives/entry/winchester\\_factory/](http://www.newhavenindependent.org/index.php/archives/entry/winchester_factory/).

<sup>180</sup> New Haven City Plan Commission, New Haven City Plan Commission Advisory Report #1442-09 at 5 (submitted for consideration at July 21, 2010 City Plan Commission meeting) (on file with the New Haven City Plan Department)

teams and the alderpersons from the neighborhood.”<sup>181</sup> He also almost immediately mentioned that his team had reduced the number of parking spaces in the original 1500 space garage to 1186 in response to neighborhood concerns, although it is certainly possible that 1500 spaces had been a soft number for Winstanley from the beginning. The project, he stated, would involve no public financing and would be fully taxable. Before opening up the discussion to public comments, Mr. Winstanley stressed that he had been in contact with local unions about construction jobs and was committed to achieving the city’s hiring goals of 25% minority, 6.9% women and 20% local residents for the project. However, he had not committed to this in any written or contract form at this point.<sup>182</sup>

The record of the May 2008 CPC hearing also shows that the developer had been in contact via mail with Alfreda Edwards, an alderwoman representing the neighborhood most directly affected by the garage development. But despite the documented outreach to the neighborhood, various residents and Alderwoman Edwards voiced opposition to the project as well as the kind of input (or lack thereof) that the community had been able to provide. Alderwoman Edwards testified that she had had two meetings with the developer to discuss the plan, but she believed that garage was too large and ultimately refused to support it. The majority of other individuals testifying voiced concerns about the environmental impact of the construction as well as traffic. Additionally, Alderwoman Edwards and at least two other neighbors called for additional conversations with the developer and/or concern about the “tone of the conversations with the developer.” Nonetheless, the developer and his attorney

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<sup>181</sup> New Haven City Plan Commission, Minutes of Meeting 1416 (May 21, 2008) (on file with New Haven’s City Plan Dept.).

<sup>182</sup> *Id.*

emphasized that the project met the necessary legal standards, and the CPC voted unanimously to adopt the Special Permit.

Winstanley continued to meet with residents after the site-plan approval to update them on the environmental clean-up of the property.<sup>183</sup> In seeking approval from the city's EDC for plans associated with the separate 344 Winchester Avenue project in February 2009, Winstanley mentioned that his team had removed a fence on the property after residents voiced that they were "uncomfortable with the wrought iron, 'gated' feel of Science Park."<sup>184</sup> Moreover, Winstanley's formal application to the EDC stated that Winstanley's team had "spoken with the Dixwell and Newhallville Management Teams, aldermanic representatives and members of the community about the progress of the garage project and...plans for 344 Winchester Avenue."<sup>185</sup> The EDC approved Winstanley's plans.<sup>186</sup>

While Winstanley met with neighborhood management teams, unions, and alderpeople in early 2008, Forest City initiated its own contact with the neighborhoods surrounding its 275 Winchester Avenue development. A newspaper article announcing Forest City as the preferred developer quotes the head of SPDC stating that the company would meet with neighborhood groups to "get input on the project," and subsequent newspaper articles covered the developers meetings with both the Newhallville and Dixwell Management Teams. The meetings that

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<sup>183</sup> Melinda Tuhus, *Winstanley Cleans Up a Lot*, NEW HAVEN INDEPENDENT (Nov. 25, 2008), [http://www.newhavenindependent.org/index.php/archives/entry/winstanley\\_cleans\\_up\\_a\\_lot/](http://www.newhavenindependent.org/index.php/archives/entry/winstanley_cleans_up_a_lot/) (Winstanley met with about two dozen people at a Newhallville neighborhood management meeting and discussed environmental clean-up at the parking garage site).

<sup>184</sup> New Haven Economic Development Commission, Draft Minutes (Feb.10, 2009) (on file with author).

<sup>185</sup> Letter from Carolyn W. Kone, Counsel to the Developer, Brenner Saltzman & Wallman LLP, to Kelly Murphy, Executive Dir., New Haven Dev. Comm'n (Dec. 31, 2008) (on file with author).

<sup>186</sup> Leonard J. Honeyman, *Commission OKs Factory Renovation*, NEW HAVEN INDEPENDENT (Feb. 11, 2009), <http://newhavenindependent.org/archives/2009/02/winstanley.php>.

followed in February 2008 show about 15 people present at the first Dixwell meeting and about 40 present at the second Newhallville meeting.

While the Dixwell meeting appears to have met with little opposition from the neighborhood, the Newhallville meeting saw more suspicion and opposition. Neighbors were mainly concerned with “[d]ensity and increased traffic...as they would bring both congestion and air pollution to an area where asthma rates are already high.”<sup>187</sup> At least one resident complained that residents “never seem to see [their] input in the final product.”<sup>188</sup> Alderwoman Edwards suggested that “community members get together on their own” to discuss their reactions to the project and follow up with developers in June. Notably, the newspaper article on the first Dixwell meeting mentioned the date for the second Newhallville meeting. Whether this notice contributed to the marked increase in attendance at the second meeting is unclear, but it may have played a role. It appears that no additional meetings took place between residents and Forest City until October 2008, however. At that meeting, it appears that Forest City mainly updated community members regarding its plans.<sup>189</sup>

The City through the EDA also made efforts to engage the community directly on the Science Park developments. EDA hosted a meeting with Newhallville and Dixwell residents in September 2008, for example. Management team members, an alderwoman representing the area, and residents expressed a desire to “be taken seriously” and participate in planning “from the beginning.”<sup>190</sup> Christine Bonanno, an EDA staffer leading the meeting, responded that “the

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<sup>187</sup>Melinda Tuhus, *Newhallville Critiques SciPark Plan*, NEW HAVEN INDEPENDENT (Feb. 27, 2008), [http://www.newhavenindependent.org/index.php/archives/entry/newhallville\\_critiques\\_scipark\\_plan/](http://www.newhavenindependent.org/index.php/archives/entry/newhallville_critiques_scipark_plan/).

<sup>188</sup> *Id.*

<sup>189</sup> Mary O’Leary, *Developers Offer Plans for Former Gun Factory*, NEW HAVEN REGISTER, Oct. 17, 2008.

<sup>190</sup> Mary E. O’Leary, *Officials Hear of Resident’s Frustrations*, NEW HAVEN REGISTER, Sept. 19, 2008.

purpose of the meeting was to get city officials to directly engage with residents.” She elaborated that it is “about building relationships and having an open dialogue...[and] about transparency.”<sup>191</sup> In addition to attempting increased dialogue with residents, at least one city staffer generally attends the neighborhood management team meetings.<sup>192</sup> According to Tony Bialecki, the EDA’s Deputy Director, the EDA has focused in recent years on ensuring that members of its staff serve as liaisons to different neighborhoods.<sup>193</sup> Nevertheless, the effectiveness of this goal is disputed by other community groups and individuals who do not believe City Hall gives residents sufficient notice of projects or allows for meaningful involvement in the planning process.<sup>194</sup>

In 2008 and 2009, the Economic Development Commission (EDC) also independently discussed ways to become more involved with communities affected by developments that fall under its purview. The EDC, composed of fifteen members<sup>195</sup> appointed by the mayor and including one elected member of the Board of Aldermen, must approve changes to municipal development plans (MDPs) like the 1981 MDP including the Science Park area.<sup>196</sup> In June 2008, for example, the Commission seriously discussed how to avoid operating like a “rubber stamp.”<sup>197</sup> Commissioners suggested appointing a “commission liaison to the public for each project,” in addition to possibly “asking the Mayor’s Office to carbon-copy a point person on all

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<sup>191</sup> *Id.*

<sup>192</sup> Interview with Roxanne Condon, *supra* note 175.

<sup>193</sup> Interview with Tony Bialecki, *supra* note 106.

<sup>194</sup> Interview with Hugh Baran and Mandi Jackson, *supra* note 106; Interview with Kevin Ewing, *supra* note 103.

<sup>195</sup> I was a member of this commission from Jan. 2008 until Mar. 2011.

<sup>196</sup> NEW HAVEN, CONN. CODE OF ORDINANCES tit. III, ch. 21, art. III, § 21-14 (2011).

<sup>197</sup> Andrew Mangino, *Koppell: Commision Should “Do Something”*, NEW HAVEN INDEPENDENT (June 19, 2008), [http://www.newhavenindependent.org/index.php/archives/entry/koppell\\_commission\\_should\\_do\\_something/](http://www.newhavenindependent.org/index.php/archives/entry/koppell_commission_should_do_something/).



e-mails related to a given project” and “shifting the standard operating procedure of the commission to promote more in-depth study by the body.”<sup>198</sup> Additionally, the commission asked the EDD about the status of its website and even wondered whether social media like Facebook could increase the commission’s visibility and the community’s ability to engage with it.<sup>199</sup>

### **3. Modification of the Planned Development District (PDD)**

It was not until Winstanley and Forest City partnered to develop the old factory at 344 Winchester Avenue and submitted an application for a zoning map and text amendment to amend the PDD applicable to the site that a new round of opposition emerged. The zoning map and text amendments sought to add a parcel (what basically corresponds to 275 Winchester Avenue or Parcel L) to the existing PDD.<sup>200</sup> The SPDC and developers submitted the joint application on June 29, 2010 to the Board of Aldermen and Town Clerk. It was then made available to the public at both the CPD and EDD on July 8.<sup>201</sup> The application would require approval by the CPC, the Legislation Committee of the Board of Aldermen, and the full Board of Aldermen before final passage. It would also require approval by the EDC and the New Haven Redevelopment Authority to ensure conformity to the applicable municipal development and

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<sup>198</sup> *Id.*

<sup>199</sup> New Haven Economic Dev. Comm’n, Minutes (June 9, 2009) (on file with author).

<sup>200</sup> New Haven City Plan Commission, Minutes of Meeting 1442 (July 21, 2010) (on file with the New Haven City Plan Dept.); New Haven City Plan Commission, New Haven City Plan Commission Advisory Report #1442-09 (submitted for consideration at July 21, 2010 City Plan Commission meeting) (describing ownership structure of SPDC sites) (on file with the New Haven City Plan Department).

<sup>201</sup> See City of New Haven Office of the Economic Development Administrator, Chronology of Public Outreach for the Proposed PDD Amendment for Old Gun Factory Site at Science Park (July 2010) (on file with author).

redevelopment plans. Subsequently, the project would require a detailed Site Plan approval at CPC.<sup>202</sup>

At least as of May 2010, staff at the EDD had been communicating with developers to develop a timeline for the PDD modification application and approval process. As part of that process, the developers met with the Newhallville and Dixwell Management Teams as well as three aldermen representing those neighborhoods. EDD staff was in communication with the developers at least one month before meeting with the Management Teams to assist with scheduling and preparation of materials.<sup>203</sup> Indeed, email communications between city staff and the developers show the city following up with developers to inquire about the outcome of the neighborhood meetings with special attention paid to attendance.<sup>204</sup>

But despite the city's and developers' efforts to communicate with residents and community leaders, the CPC hearing on the PDD modification proved highly contentious. Prominent community leaders, including a state representative, "decried a lack of community input" in the development process.<sup>205</sup> They called for the process to "slow down" in order to

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<sup>202</sup>*Id.*

<sup>203</sup> Email from Raymond Smith, Econ. Dev. Officer, City of New Haven Office of Econ. Dev., to Anthony Duff and Rebecca Sweeny-Burns, Lieutenants, City of New Haven Police Dep't (May 18, 2010, 02:34 PM (city staff scheduling meetings with management teams for developers) (on file with author); Email from Ted DeSantos, Senior Vice President, Fuss & O'Neill, Inc., to Tony Bialecki, Deputy Dir, of Econ. Dev., City of New Haven Econ. Dev. Admin., Carbon Copying Carter Winstanley, Developer, Winstanley Enterprises, and Abe Naparstek, Developer, Forest City Enterprises (May 19, 2010, 09:13 AM) (including neighborhood outreach as part of the plan for obtaining approval of the PDD modification) (on file with author); Email from Raymond Smith, Econ. Dev. Officer, City of New Haven Office of Econ. Dev., to Carolyn Kone, Counsel to the Developer, Brenner Saltzman & Wallman LLP, Carbon Copying Kelly Murphy, Econ. Dev. Administrator, New Haven Econ. Dev. Admin. (June 1, 2010, 12:14 PM) (city staff helping to coordinate developer meetings with aldermen) (on file with author).

<sup>204</sup> Email from Raymond Smith, Econ. Dev. Officer, City of New Haven Office of Econ. Dev., to Abe Naparstek, Developer, Forest City Enterprises (June 24, 2010, 09:37 AM).

<sup>205</sup> Thomas MacMillan, *Amid Barbs, Winchester Project Advances*, NEW HAVEN INDEPENDENT (July 22, 2010), [http://www.newhavenindependent.org/index.php/archives/entry/winchester\\_factory\\_re-do\\_under\\_fire/](http://www.newhavenindependent.org/index.php/archives/entry/winchester_factory_re-do_under_fire/).

better evaluate the plans, which several people claimed they had not seen.<sup>206</sup> In response to complaints about access to the plans, Ed Mattison, the head of the CPD, stated that the plans had been made available for public viewing in the department's offices in City Hall.<sup>207</sup> Opponents also "raised concerns about traffic, tax abatement, and local hiring."<sup>208</sup>

Against a backdrop of opposition throughout the "tense three-hour meeting," commissioners nevertheless voted unanimously to recommend approval of the application, arguing that "their role as a recommending body is limited to zoning matters only."<sup>209</sup> In addition, the Chair of the commission stated that "neighbors need[ed] to take some responsibility" for the lack of communication. He added that "[n]eighbors need to make clear and reasonable requests."<sup>210</sup> Moreover, in response to a commissioner's request for clarification on the possibility of a community benefits agreement, the head of the CPD responded that "[a] community benefits agreement usually was generated when City land was being transferred (in this case Science Park owned the land) or when there were city funds involved."<sup>211</sup> It is notable that such a characterization of community based agreements runs counter to the common definition of such agreements as those entered into between communities and developers.

Even with the CPD's approval, however, the PDD modification application appears to have set off intense negotiations and discussions among city staff, aldermen, and developers that ultimately led to a quick diffusion of the hostility, concrete gains by the community, and ultimate

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> New Haven City Plan Commission, Minutes of Meeting 1442 (July 21,2010) (on file with the New Haven City Plan Dept.)

approval by the Board of Aldermen. The EDD, for example, sent a chronology of community outreach efforts to the head of the Legislation Committee of the Board of Aldermen prior to its hearing on the matter in response to the committee's request for such information.<sup>212</sup> Notably, the chronology of events included a letter from the developer's attorney to Kelly Murphy, the Economic Development Administrator, indicating that it would voluntarily aim to achieve the City's goals for City construction projects relating to the hiring of residents, minorities, women, and small and minority businesses.<sup>213</sup> Prior to the CPC hearing, the developer had not committed to this in writing.<sup>214</sup> In addition, although unreported, at least one alderperson believes that a crucial meeting took place between the developers, aldermen, and city staff after the contentious CPC meeting to iron out the developers' commitment to jobs and secure neighborhood approval before the Board of Aldermen hearings.<sup>215</sup> Moreover, in the week after the CPC hearing, Winstanley also had "several meetings with community groups and conducted tours of the Winchester site."<sup>216</sup>

In contrast to the CPC hearing, the Board of Aldermen Legislation Committee meeting was described as a "four-hour public hearing of mostly favorable remarks."<sup>217</sup> The committee voted unanimously to approve the PDD modification, although it withheld "favorable" recommendation. This allowed the aldermen to propose the modification for final approval while

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<sup>212</sup> Memorandum from Kelly Murphy, Econ. Dev. Administrator, New Haven Econ. Dev. Admin., to Roland Lemar, Chariman of the Legislation Committee, Board of Aldermen (July 29, 2010) (on file with author).

<sup>213</sup> *Id.*

<sup>214</sup> Allan Appel, *Winchester Factory's Renewal Lurches Ahead*, NEW HAVEN INDEPENDENT (Jul. 30, 2010), <http://newhavenindependent.org/index.php/archives/entry/winchester/>.

<sup>215</sup> Interview with Frances "Bitsie" Clark, *supra* note 100.

<sup>216</sup> Allan Appel, *Winchester Factory's Renewal Lurches Ahead*, NEW HAVEN INDEPENDENT (Jul. 30, 2010), <http://newhavenindependent.org/index.php/archives/entry/winchester/>.

<sup>217</sup> *Id.*

also adding reservations, although not in the form of conditions, “about traffic, local job hiring, and the level of input from the immediate neighborhood.”<sup>218</sup> One of the committee members described the strategy as one that “gives [them] time to tweak [the recommendation], to have meetings, [and] to get things on paper.”<sup>219</sup> The full Board of Aldermen approved the PDD modification a few weeks later.<sup>220</sup>

Overall, the relationship between developers and the community appears to have been mostly one where management teams received information and updates about the project, although there is some evidence of responsiveness in terms of the substance of the developments (i.e. the taking down of the fence by Winstanley; the reduction in parking spaces; and a letter to the EDA stating a commitment (albeit not enforceable in any way) to following the City’s hiring goals for construction developed out of neighborhood conversations). In terms of neighborhood expertise throughout the approval process for both the Winstanley and Forest City developments, lawyers appear to have been absent, and at least the chair of the Newhallville Management Team at the time, Roxanne Condon, acknowledges limited expertise in land use. She had not heard about CBAs, for example, and admits that her community may have been able to bargain more effectively with developers had they had a more sophisticated understanding of the process.<sup>221</sup> She had mainly conceived of the relationship between residents and developers as one of information-sharing and was generally satisfied with the one or two meetings that took place

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Thomas MacMillan, *Winchester Factory Re-Do Gets Green Light*, NEW HAVEN INDEPENDENT (Sept. 8, 2010), [http://www.newhavenindependent.org/index.php/archives/entry/winchester\\_factory\\_re-do\\_gets\\_green\\_light/](http://www.newhavenindependent.org/index.php/archives/entry/winchester_factory_re-do_gets_green_light/).

<sup>221</sup> Interview with Roxanne Condon, *supra* note 175.

between neighbors and developers each year from the time Winstanley and Forest entered the area to the final approval of the PDD modification.<sup>222</sup>

Aldermen appear to have been regularly involved in the development process and neighborhood discussions as evidenced by their participation in the CPC hearings, presence at management team meetings, and an interview with Roxanne Condon, the Newhallville management team chair.<sup>223</sup> It is important to note, nevertheless, that a number of other aldermen, community organizers, and community organizations interviewed generally agree that one cannot rely on aldermen to actively engage with their constituents or serve as a main conduit for citizen engagement in the land use process.<sup>224</sup>

Finally, the PDD modification process undoubtedly proved the peak organizing and leverage point for the community surrounding the Winchester development. While vocal opposition at the CPC failed to stop the proceedings, the fact that the PDD modification proposal still had to pass the Legislation Committee and full Board of Aldermen appears to have slowed the process down enough for opposition to use the threat of its resistance as real leverage in negotiating a concrete commitment on jobs from the developers. Notably, the PDD approval standards are also broad enough that they allow an infusion of political and non-technical concerns into the final decision.<sup>225</sup> Thus, the case highlights the potential of the PDD process to galvanize opposition, slow down the approval process, and increase community leverage in

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Interview with Frances “Bitsie” Clark, *supra* note 100; Interview with Hugh Baran and Mandi Jackson, *supra* note 100; Interview with Kevin Ewing, *supra* note 103.

<sup>225</sup> Ravikumar Jayaraman, *supra* note 9, at 441.

negotiation, all factors which arguably promote or facilitate meaningful participation in development decisions.

### **C. The Yale School of Management (SOM) Expansion**

In September 2007, Yale University announced that it had chosen a design firm and site for its construction of a new SOM.<sup>226</sup> It sought to build a new structure on a site occupied by two historic buildings in the East Rock area. The site is bordered on the east by homes on Lincoln Street and to the north by the driveway to the New Haven Lawn Club, a private New Haven club chartered in 1891.<sup>227</sup> The proposed structure would occupy approximately 237,000 square feet of building space and accommodate up to 600 students.<sup>228</sup> Yale had started to meet with residents since March 2006 about the development.<sup>229</sup> And within weeks of the September 2007 announcement of the selection of a design firm and site, preservationists responded and planned to mobilize neighborhood groups and organizations.<sup>230</sup> The entire site was owned by Yale University.<sup>231</sup>

On October 13, 2009, Yale University submitted an application to create a new PDD for the site in order to consolidate the two zones splitting the site: an RM-2 (High Middle Density) and

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<sup>226</sup> Steve Higgins, *Campus Project Moves Ahead: Design Firm Picked for New Yale School*, NEW HAVEN REGISTER, Sept. 22, 2007.

<sup>227</sup> NEW HAVEN LAWN CLUB, [http://www.nhlawnclub.com/?page\\_id=78](http://www.nhlawnclub.com/?page_id=78) (last visited Apr. 22, 2011). See Appendix A for a map of the area.

<sup>228</sup> New Haven City Plan Commission, New Haven City Plan Commission Planned Development Action #1434-05 at 2 (on file with New Haven's City Plan Dept.).

<sup>229</sup> Yale University, Yale Powerpoint presentation presented at Board of Aldermen Hearing (2010) (on file with author).

<sup>230</sup> Randall Beach, *Trust Fails to Save Historic Whitney Ave. Building*, NEW HAVEN REGISTER, Nov. 26, 2007.

<sup>231</sup> *Id.*

RO (Residential-Office) zone.<sup>232</sup> Because university uses are allowed “as of right” in the two zones, Yale’s PDD application did not propose a less-restrictive use on either zone, and it did not seek expansion of any pre-existing nonconforming uses.<sup>233</sup> By the time the first CPC hearing on the PDD application came about in November 2009, at least the Lawn Club and the New Haven Urban Design League had retained lawyers to represent them throughout the formal process.<sup>234</sup> At the meeting, close to ten individuals spoke in favor or in opposition to the project. Those in favor largely praised the advantages a state of the art school would bring to New Haven. Those opposing the project cited a threat to home values, interference with light and traffic, the historic status of the pre-existing buildings, and the adequacy of the PDD application. Commissioners unanimously voted to leave the record open for additional written submissions prior to the next monthly meeting in December at which it would formally vote on whether to recommend the project to the Board of Aldermen. One of the commissioners emphasized that the Board of Aldermen hearings would provide “the opportunity for the public to engage...in a less restrictive manner.”<sup>235</sup>

The CPC approved the PDD application in December 2009,<sup>236</sup> and Yale continued to meet with neighbors and the Lincoln-Bradley Association, a group of homeowners in the adjacent area

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<sup>232</sup> *Id.* at 6; Tagliarini v. New Haven Bd. of Aldermen, CV106010699S, 2011 WL 1288638, at \*1 (Conn. Super. Ct. Mar. 11, 2011), *decision supplemented sub nom.* Tagliarini v. New Haven BOA, CPC, CV106010699S, 2011 WL 1366639 (Conn. Super. Ct. Mar. 14, 2011).

<sup>233</sup> *Id.* at 6, 7.

<sup>234</sup> Thomas MacMillan, *SOM Building Plan Irks the Lawn Club*, NEW HAVEN INDEPENDENT (Nov. 19, 2009), [http://www.newhavenindependent.org/index.php/archives/entry/som\\_building\\_plan\\_irks\\_the\\_lawn\\_club/](http://www.newhavenindependent.org/index.php/archives/entry/som_building_plan_irks_the_lawn_club/).

<sup>235</sup> New Haven City Plan Commission, Minutes of Meeting 1434 (Nov.18, 2009) (on file with the New Haven City Plan Dept.).

<sup>236</sup> Further highlighting the extent of participation at the CPC hearings, the November CPC hearing comprised one hundred and eleven pages of transcript and the December CPC hearing comprised thirty-nine pages. Tagliarini v. New Haven Bd. of Aldermen, CV106010699S, 2011 WL 1288638, at \*8 (Conn. Super. Ct. Mar. 11, 2011), *decision*



in anticipation of the Legislation Committee hearing.<sup>237</sup> Prior to the Legislation Committee meeting on January 28, 2010, Yale had modified its plans to give “residential neighbors more side yard breathing room.”<sup>238</sup> Nevertheless, the Legislation Committee saw strong debate on the issue. Yale, for example, submitted more than 200 signatures in support of the project from architects, construction workers, neighbors, and businesses.<sup>239</sup> Public testimony comprised thirty seven pages, including testimony by Joseph Tagliarini, an abutting owner, who “prepared boards containing drawings showing the effect on his property of the proposed structure.”<sup>240</sup> In response, the committee extended the public hearing to the next meeting on February 11, 2010.

Approximately 150 people attended the second hearing representing both sides of the issue. Yale emphasized that it had done extensive outreach over four years, holding eight neighborhood meetings, more than a dozen meetings with individual property owners, numerous e-mail, telephone, and informal communications with interested individuals, and making the plans available for public view for 120 days.<sup>241</sup> After four hours of deliberation, the committee

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*supplemented sub nom.* Tagliarini v. New Haven BOA, CPC, CV106010699S, 2011 WL 1366639 (Conn. Super. Ct. Mar. 14, 2011).

<sup>237</sup> Melinda Tuhus, *East Rocker Query: Why the Teardowns?*, NEW HAVEN INDEPENDENT (Dec. 22, 2009), [http://www.newhavenindependent.org/index.php/archives/entry/east\\_rocker\\_query\\_why\\_the\\_teardowns/](http://www.newhavenindependent.org/index.php/archives/entry/east_rocker_query_why_the_teardowns/); Allan Appel, *SOM Plan Revised*, NEW HAVEN INDEPENDENT (Jan. 22, 2010), [http://www.newhavenindependent.org/index.php/archives/entry/som\\_revised1/](http://www.newhavenindependent.org/index.php/archives/entry/som_revised1/).

<sup>238</sup> Allan Appel, *SOM Plan Sparks Fiery City Hall Hearing*, NEW HAVEN INDEPENDENT (Jan. 29, 2010), [http://www.newhavenindependent.org/index.php/archives/entry/som\\_do\\_som\\_dont/](http://www.newhavenindependent.org/index.php/archives/entry/som_do_som_dont/).

<sup>239</sup> *Id.*

<sup>240</sup> Tagliarini v. New Haven Bd. of Aldermen, CV106010699S, 2011 WL 1288638, at \*9 (Conn. Super. Ct. Mar. 11, 2011).

<sup>241</sup> Allan Appel, *Committee Oks New SOM Home*, NEW HAVEN INDEPENDENT (Feb. 12, 2010), [http://www.newhavenindependent.org/index.php/archives/entry/yale\\_school\\_of\\_management\\_design\\_advances/](http://www.newhavenindependent.org/index.php/archives/entry/yale_school_of_management_design_advances/); Yale University, Yale Powerpoint presentation presented at Board of Aldermen Hearing (2010) (on file with author).

approved the proposed PDD for full Board of Aldermen consideration.<sup>242</sup> By the end, the committee had held approximately ten hours of public hearing on the issue.<sup>243</sup>

Ultimately, at the March 1, 2010 full Board of Aldermen hearing, ninety six percent of the Board of Aldermen approved the proposed PDD.<sup>244</sup> However, Joseph Tagliarini filed an appeal in Superior Court of the Board of Aldermen's decision.<sup>245</sup> He alleged that the PDD approval process was “‘arbitrary and illegal substantively’ and ‘fatally flawed procedurally.’”<sup>246</sup> On March 11, 2011, the Court dismissed the appeal, holding that it could not find that the Board of Aldermen “acted outside the bounds of its permitted legislative discretion in approving the PDD.”<sup>247</sup>

Generally, the community participation that occurred throughout the planning and approval of the SOM building was organized and entirely led by Yale. While the CPD may have encouraged the university as it encourages most, if not all, private developers to meet with the neighborhood prior to submitting a formal application, the university clearly took the lead in doing so.<sup>248</sup> Notably, hearings on the SOM PDD plan were extended at both the CPC and

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<sup>242</sup> *Id.*

<sup>243</sup> New Haven Board of Aldermen, Journal of the Board of Aldermen-Final 44 (Mar. 1, 2010), *available at* [http://legsvcs.cityofnewhaven.com/meetings/2010%5C3/1132\\_M\\_Board\\_of\\_Aldermen\\_10-03-01\\_Journal\\_of\\_the\\_Board\\_of\\_Aldermen.pdf](http://legsvcs.cityofnewhaven.com/meetings/2010%5C3/1132_M_Board_of_Aldermen_10-03-01_Journal_of_the_Board_of_Aldermen.pdf). (“After ten hours of public hearings with dozens of speakers and scores of e-mailed testimony, the committee voted to favorably recommend the PDD overall, incorporating the City Plan report with modification in favor of Yale's responses.”).

<sup>244</sup> Melissa Bailey, *SOM Plan Gets Final OK*, NEW HAVEN INDEPENDENT (March 2, 2010), [http://www.newhavenindependent.org/index.php/archives/entry/som\\_plan\\_gets\\_final\\_ok/](http://www.newhavenindependent.org/index.php/archives/entry/som_plan_gets_final_ok/).

<sup>245</sup> Tagliarini v. New Haven Bd. of Aldermen, CV106010699S, 2011 WL 1288638, at \*1 (Conn. Super. Ct. Mar. 11, 2011).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at \*31.

<sup>248</sup> Interview with Karyn Gilvarg, *supra* note 106 (explained that the CPD normally encourages private developers to meet with residents prior to formal hearings on applications before the CPC).

Legislation Committee levels. Lawyers for opponents and the developer were also present in discussions as early as the first CPC hearing, adding substantially to the level of expertise at those hearings and shaping the nature of the arguments in opposition to the project. And, as both the Worthington Hooker and Winchester case studies demonstrate, the issue of community participation was front and center at many of the hearings. Indeed, the first slide of Yale's presentation at the Board of Aldermen hearing in this case consisted of a summary of the university's engagement with neighbors on the project.<sup>249</sup> Additionally, the judicial decision affirming the PDD's approval emphasized the importance of comments made by residents throughout the formal hearings. The decision stated that courts should utilize comments made by residents about the proposed plan in evaluating whether the proposal abides by one of the PDD requirements that the plan must, in part, "complement the design and values of the surrounding neighborhood."<sup>250</sup>

#### **D. The East Shore Power Plant Expansion**

In August 2010, the Public Service Electric and Gas Company (PSEG), the City of New Haven, and community groups signed a CBA concerning PSEG's expansion of its power plant in the East Shore neighborhood. East Shore is a largely white, suburban-like neighborhood.<sup>251</sup> The

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<sup>249</sup> Yale University, Yale Powerpoint presentation presented at Board of Aldermen Hearing (2010) (on file with author).

<sup>250</sup> "[T]he requirements and restrictions of underlying zones which a PDD would supersede do have relevance on the question of the "values of the surrounding neighborhood" which must be taken into account under Section 65. To a great extent such values can be inferred from what residents express as to their opinions about the nature of any proposed development which would bring changes to their neighborhood. Opinions in such a context reveal aspects of their neighborhood which are important to them." Tagliarini v. New Haven Bd. of Aldermen, CV106010699S, 2011 WL 1288638, at \*24 (Conn. Super. Ct. Mar. 11, 2011), *decision supplemented sub nom.* Tagliarini v. New Haven BOA, CPC, CV106010699S, 2011 WL 1366639 (Conn. Super. Ct. Mar. 14, 2011).

<sup>251</sup> According to 2000 statistics, 92.7% of the East Shore neighborhood is white. DataHaven, [http://www.ctdatahaven.org/data.php?s=1&t=2&g=250&i=271&step=3&yf\]=16](http://www.ctdatahaven.org/data.php?s=1&t=2&g=250&i=271&step=3&yf]=16); DOUGLAS W. RAE, CITY: URBANISM AND ITS END 101, 341, 389 (Yale Univ. Press, 2003). See Appendix E for a map of the neighborhood.

CBA in this case was the first CBA in New Haven that included community groups as signatories.<sup>252</sup> The company sought a state permit to operate three new “peaker” generators “to be used when the regional electrical grid needs extra power.”<sup>253</sup> The path to this CBA presents an especially relevant case study for the assessment of community participation in New Haven in that it was subject to a unique and robust set of formal mechanisms for community engagement that only apply to companies seeking to establish or expand facilities in environmental justice communities under Connecticut’s new 2009 environmental justice law.<sup>254</sup>

In accordance with the environmental justice law, any company seeking a permit from the Connecticut Department of Environmental Protection (DEP) or the Connecticut Siting Council (Siting Council) for a “facility that is defined as an affecting facility and is proposed to be located or expanded in an environmental justice community” must comply with the following process requirements: 1) file a meaningful public participation plan and receive approval for such plan prior to filing an application with either DEP or the Siting Council; 2) “consult with the chief elected official or officials of the town or towns in which the affecting facility is proposed...to evaluate the need for a community environmental benefit agreement; and 3) notify, in writing, local residents and environmental groups potentially affected by the facility activities

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<sup>252</sup>Salkin and Lavine have pointed out that community groups pushing for CBAs should require their inclusion in any signed contract; the ability of third-party beneficiaries to enforce CBA has not been resolved. Salkin & Lavine, *supra* note 26, at 32.

<sup>253</sup> Abram Katz, *City, PSEG Strike Tentative Pact*, NEW HAVEN INDEPENDENT (Nov. 10, 2009), [http://www.newhavenindependent.org/index.php/archives/entry/city\\_pseg\\_strike\\_tentative\\_pact/](http://www.newhavenindependent.org/index.php/archives/entry/city_pseg_strike_tentative_pact/).

<sup>254</sup> CONN. GEN. STAT. § 22a-20a (2011).

and operations;” and 4) submit a final report to DEP through its Environmental Justice Program which documents the implementation of the Plan.<sup>255</sup>

The DEP Public Participation Plan forms and guidelines have attempted to give meaning to the statute’s requirements. For example, in requiring applicants to identify a time and place for an informal public meeting, the form explains that the applicant “must take into consideration convenience for the residents of the affected environmental justice community.”<sup>256</sup> DEP goes so far as to suggest announcements in multiple languages when appropriate, use of church bulletins, and radio broadcasts.<sup>257</sup> Newspaper notice “must be a minimum one-quarter page advertisement” and the basic form requires an applicant to consider additional notice mechanisms and specifically indicate which ones will be utilized.<sup>258</sup> No such printed guidelines or forms are utilized by the City in arranging community participation in the types of public, public/private, or private developments previously described.

## **1. The Beginning**

In this case, City staff began discussions with the company well in advance of any community involvement. The City assumed a hard stance from the beginning, making it clear to PSEG that it would oppose any expansion that would lead to a net increase in emissions. Only upon agreement on the no increase in net emissions would the city begin to consider including jobs or tax issues into negotiations. After some reluctance on PSEG’s part to negotiate seriously,

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<sup>255</sup> STATE OF CONN. DEP’T. OF ENVTL. PROT., THE ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION GUIDELINES 3,4,7 (May 2010), available at [http://www.epa.gov/air/ej/pdfs/EJ\\_Guidelines\\_Public\\_Participation.pdf](http://www.epa.gov/air/ej/pdfs/EJ_Guidelines_Public_Participation.pdf).

<sup>256</sup> STATE OF CONN. DEP’T. OF ENVTL. PROT., ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION PLAN 2 (May 2010), available at [http://www.epa.gov/air/ej/pdfs/EJ\\_Plan\\_unprotected.pdf](http://www.epa.gov/air/ej/pdfs/EJ_Plan_unprotected.pdf).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 2-3.

the company came back to the City with increased seriousness approximately one month before the first public hearing in August 2009.<sup>259</sup> PSEG convened this first public hearing, and the City did not formally assist the company in reaching out to neighborhood groups in anticipation of this meeting because the City saw such outreach as part of PSEG's responsibility.<sup>260</sup> However, various community groups learned that the City was talking with PSEG through informal channels.<sup>261</sup>

Dozens attended the first public meeting, including state and local representatives, presenting significant opposition to PSEG's expansion which was grounded in environmental and health concerns.<sup>262</sup> A variety of coalitions, neighborhood groups, and community representatives subsequently joined forces. They included the New Haven Environmental Justice Network (NHEJN), which formed in response to this particular project, the Connecticut Coalition for Environmental Justice (CCEJ), the Connecticut Fund for the Environment (CFE), the East Shore Management Team, the Forest Avenue Business Association, State Representative Bob Magna, and the aldermen representing the East Shore area.<sup>263</sup>

## 2. Negotiating with Community Representatives

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<sup>259</sup> Interview with Robert Smuts, Chief Administrator, City of New Haven, in New Haven, Conn. (Jan. 26, 2011).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> Thomas MacMillan, *At Hearing, Peak Plant Piques Neighbors*, NEW HAVEN INDEPENDENT (Aug. 5, 2009), [http://www.newhavenindependent.org/index.php/archives/entry/at\\_hearing\\_peak\\_plant\\_plan\\_piques\\_neighbors/](http://www.newhavenindependent.org/index.php/archives/entry/at_hearing_peak_plant_plan_piques_neighbors/).

<sup>263</sup> Telephone Interview with Nathalie Alegre, Former Co-Chair, New Haven Env'tl. Justice Network, (Jan. 20, 2011); Memorandum of Understanding between PSEG Power Connecticut LLC, the City of New Haven, New Haven Environmental Justice Network, Connecticut Coalition for Environmental Justice, and the Connecticut Fund for the Environment (Nov. 19, 2009) [hereinafter Memorandum of Understanding] (on file with author).

After the initial public meeting, negotiations began between city, PSEG, and community groups. Initially, community representatives met primarily with Robert Smuts, the City's Chief Administrative Officer; a community organizer characterizes the meetings as meetings as mainly information-sharing ones.<sup>264</sup> However, the meetings eventually transitioned into negotiations with city staff, neighborhood groups, and PSEG officials in the same room. These meetings were not public meetings on the record,<sup>265</sup> and they remained relatively small with approximately ten core representatives.<sup>266</sup>

Alegre believes that the shift to meetings where community members could negotiate directly with PSEG resulted from two conscious community strategies for increasing leverage. First, community groups gathered approximately two hundred signatures opposing any net increases in pollution from the expansion, an action which may have effectively shown their commitment to the issue. Second, Roger Reynolds, a senior attorney for the Connecticut Fund for the Environment who worked closely with the various coalitions and community groups, submitted a request to DEP for a public information session to be conducted by PSEG pursuant to §§ 22a-174-2a and 22a-174-33.<sup>267</sup> Such a public information session would require a substantial amount of investment in time and money from PSEG, and it was clear to organizers that PSEG would want to avoid this if possible. Additionally, Alegre believes that the Connecticut Coalition for Environmental Justice's successful opposition of a permit to operate New Haven's English

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<sup>264</sup> *Id.*

<sup>265</sup> Interview with Robert Smuts, *supra* note 259.

<sup>266</sup> Telephone Interview with Nathalie Alegre, *supra* note 263.

<sup>267</sup> *Id.*

Station Power Plant in 2001 may have contributed to the community's leverage in this case.<sup>268</sup> In a sense, various groups had become repeat players with a reputation for effectiveness.

### **3. The CBA**

While the City continued to be committed to no increase in net emissions throughout the process, community groups pushed for operational changes that would require the plan to implement new, pollution-reducing technology prior to expanding. Eventually, PSEG, the City, and community members reached a Memorandum of Understanding (MOU) that later formed the basis of the CBA. Chief Administrator for the City, Robert Smuts, stated in an interview that the City deferred largely to the advice of CFE's lawyer in negotiating specific terms.<sup>269</sup> The MOU, in part, guaranteed that PSEG would offset emissions of nitrogen oxides, sulfur dioxides, and particulate matter. The company agreed to submit an annual report to the City documenting the total generation of such gases and particulate matter. In addition, PSEG promised to contribute \$500,000 for funding projects "that will have the maximum benefit for the air quality in the neighborhoods surrounding the Facility."<sup>270</sup> The MOU specified that the City "shall make all efforts to reach consensus with NHEJN, CCEJ, CFE and the relevant community with respect to the exact projects for which the [funds would be] utilized."<sup>271</sup> Alegre believes that groups retained significant control over the specific plans for the funds with the City contributing to the thinking and final approval.

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<sup>268</sup> For a discussion of the English Station Power Plant opposition, see Conn. Coal. for Envtl. Justice, [http://www.environmental-justice.org/issues/english\\_station.html](http://www.environmental-justice.org/issues/english_station.html) (last visited Jan. 23, 2011).

<sup>269</sup> Interview with Robert Smuts, *supra* note 259.

<sup>270</sup> Memorandum of Understanding, *supra* note 263, at Part IV.

<sup>271</sup> *Id.*



In return for PSEG's commitments, the City and community groups agreed to not oppose the permit. The City promised to publicly state its support "in state or local regulatory proceedings concerning the Project upon reasonable requests of PSEG."<sup>272</sup> The NHEJN and CCEJ agreed to withdraw their request that PSEG hold a public information session under the state statutes mentioned above.<sup>273</sup> The final signatories to the January 2010 CBA included the co-chairs of the NHEJN, the president of the CCEJ, the executive director of CFE, New Haven's mayor, and president of PSEG Power Connecticut LLC.<sup>274</sup> The Board of Aldermen ultimately approved receipt of funds into a separate account from which only the City could withdraw funds.<sup>275</sup>

Overall, the case offers insight into how formal mechanisms outside of the usual (and arguably minimal) federal, state, and city mechanisms like the 2009 Environmental Justice law can alter dynamics between the city, developers, and residents by creating additional leverage for community groups. The fact that the process led to the first CBA with community groups as signatories generally reflects well on the potential of those formal mechanisms if one seeks more meaningful community participation in land use decisions. Nevertheless, other factors may have played an important, if not more crucial role, in arriving at such a CBA. As previously mentioned, the City in this case was committed to no increase in net emissions from the start and open to community participation.<sup>276</sup> Community groups and neighbors concerned with

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<sup>272</sup> *Id.*, at Part V.

<sup>273</sup> *Id.*

<sup>274</sup> Community Environmental Benefit Agreement (Jan. 15, 2010) (on file with author).

<sup>275</sup> Memorandum of Understanding, *supra* note 263, at Part IV.

<sup>276</sup> Telephone Interview with Nathalie Alegre, *supra* note 263 (City was "very open" to participation).

environmental issues had organized successful opposition to a power company around 2001. Additionally, an active statewide coalition was in place, evidenced by the successful lobbying for the 2009 Environmental Justice law. The various community groups that emerged were led by paid organizers, such as Nathalie Alegre, and experts in environmental law, such as Roger Reynolds, the lawyer with CFE.

In addition, the East Shore neighborhood affected, while generally middle class and perhaps not as sophisticated as the East Rock neighborhood involved in the Hooker school case, may have gained useful organizing experience throughout a heated battle over a PDD designation which ended at the state Supreme Court in 2007.<sup>277</sup> When asked whether the 2009 law played a crucial role in the process, Smuts explained that the City would have likely gotten involved and intervened in the process regardless.<sup>278</sup> In his view, the main benefit derived from the law was the significant advance notice.<sup>279</sup> He believes the City would have faced a tougher challenge organizing and “getting geared for a fight” without it.<sup>280</sup>

## **VI. MAKING SENSE OF NEW HAVEN’S APPROACH TO COMMUNITY PARTICIPATION AS ILLUSTRATED IN THE FOUR CASE STUDIES**

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<sup>277</sup> See Ravikumar Jayaraman, *supra* note 9; Campion v. Bd. of Aldermen of City of New Haven, 272 Conn. 920 (2005). Additional research and interviews would be necessary to establish this link. The PSEG power plant is approximately 3.5 miles from the business at issue in the Campion case. See GOOGLEMAPS, [http://maps.google.com/maps?f=d&source=s\\_d&saddr=1+Waterfront+Street,+New+Haven,+CT+06512-1714&daddr=450+Lighthouse+Road,+New+Haven,+CT&hl=en&geocode=FZiAdgIdY5Wn-yn78krAJtjniTFHMDdLKdeePQ%3BFSGEdQIdrb-n-ymvvQV0BHjoiTFuTkBff7PQpQ&mra=ls&sll=41.284256,-72.90081&sspn=0.128994,0.308647&ie=UTF8&ll=41.274452,-72.897377&spn=0.067732,0.154324&t=h&z=13&layer=c&pw=2](http://maps.google.com/maps?f=d&source=s_d&saddr=1+Waterfront+Street,+New+Haven,+CT+06512-1714&daddr=450+Lighthouse+Road,+New+Haven,+CT&hl=en&geocode=FZiAdgIdY5Wn-yn78krAJtjniTFHMDdLKdeePQ%3BFSGEdQIdrb-n-ymvvQV0BHjoiTFuTkBff7PQpQ&mra=ls&sll=41.284256,-72.90081&sspn=0.128994,0.308647&ie=UTF8&ll=41.274452,-72.897377&spn=0.067732,0.154324&t=h&z=13&layer=c&pw=2).

<sup>278</sup> Interview with Robert Smuts, *supra* note 259.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

The following section aims to more fully distill from the previous sections just how community participation functions in New Haven. It will first focus on how the formal and informal mechanisms at play in the case studies come together, emphasizing the unique importance of class and the PDD process in achieving meaningful participation. It will then briefly go back to the question of whether changes in takings law may also influence city planners' approach to community participation. The section will also point to several normative questions and concerns that could help both planners, communities, organizers, and public interest lawyers assess their roles in New Haven's current and future development.

#### **A. Formal and Informal Mechanisms for Community Participation at Play in New Haven**

Despite New Haven's outward commitment to community participation in principle, the City operates under a very limited formal process for community participation. The formal mechanisms at play rarely go beyond simply informing residents at some point or another of development plans in their neighborhood through newspaper, and in some cases, individual notice. However, the land use approval process, as a whole, offers substantial leeway for communities to informally shape the process according to popular demand in order to increase their influence. The four case studies probed in this essay demonstrate just how communities can and do shape the community participation process by both demanding ad hoc, project-specific mechanisms for participation and deriving as much use as possible from formal ones. However, even though communities can not only participate but actually shape a participation process, it is clear that sophistication and class (and arguably race insofar as it often correlates with class) affect just how successful a community is in doing so. Finally, the case studies generally point to the unique role of the flexible PDD process in ensuring meaningful community participation in New Haven land development. Certainly, this paper acknowledges the possibility that drawing

generalizations from four cases studies may not lead to the most accurate or definitive conclusions.

## **1. Condensing the Formal Mechanisms**

As Section IV above discusses, federal laws, which don't always play a role in local land development, may require "meaningful participation." However, such "meaningful participation" has not been formally defined and generally lacks any real teeth. At the state level, the ordinary land use laws do not offer much to ensure "meaningful participation." They usually provide only a week or two weeks of advance notice and access to applications or materials submitted by developers. A few local ordinances add to the state laws, especially when it comes to personalized notice. But few city ordinances add much in terms of advance notice beyond the usual one or two weeks or access to zoning applications by residents. Arguably, the most robust provisions for advance notice of hearings and advance access to materials (at least in comparison to the state laws) can be found in the process for changing the text of the zoning ordinances or maps, which also applies to approving a PDD or PDU, a process not unique to New Haven. Indeed, and perhaps understandably so, the head of the CPD prefers to steer clear of formal mechanisms for participation because of the potential liability they create.<sup>281</sup>

## **2. Distilling the Informal Mechanisms**

With regards to informal mechanisms for participation, the case studies make clear that public outreach on the part of developers is a common concern and topic of conversation regardless of whether the development is public, public-private, or private. The CPC, EDA, EDC, and Board of Aldermen all affirmatively participate in and perpetuate a narrative that

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<sup>281</sup> Interview with Karyn Gilvarg, *supra* note 106.

considers some form of community participation in land use decision-making essential to the decisions' legitimacy. In terms of informal mechanisms utilized by City staff, the CPD and EDA are both committed to promoting some type of community participation. As the case studies demonstrate and interviews confirm, at the CPD, developers are always encouraged to meet with residents in the areas their development will affect in order to obtain support and generally respond to concerns. At the EDA, staff also encourages developers to meet with residents, and individual staff members act as informal liaisons to the various neighborhoods. As previously mentioned, in both departments, the more "public" the project, the more involved city staff will be in actually organizing meetings with neighbors and encouraging developers involved to engage the community.<sup>282</sup> The sliding scale of city involvement in designing the community participation process depending on how public the project is, however, does beg for increased scrutiny on the City's use of public-private vehicles like the SPDC for development considering the ease with the various public and private actors involved appear to transfer and lease properties.

In addition, the case studies highlight both the CPD's and EDA's openness to designing informal mechanisms on a project-by-project basis and in accordance with resident demands. In the Hooker school case, residents pushed the city to support its subcommittee to choose a school site not only by allowing it to operate for six months before jumping in, but by actually funding thousands of surveys mailed out to registered voters in the area. Moreover, the CPD's analysis of the approximately twenty potential sites for the school expansion essentially shows residents putting CPD staff to work on research they desired. In the Winchester case, vocal opposition to the Winchester's PDD modification application led to intense behind-the-scenes negotiations

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<sup>282</sup> *Id.*; Interview with Karyn Gilvarg, *supra* note 6; Interview with Tony Bialecki, *supra* note 106.

amongst aldermen, residents, city staff, and the developers which ultimately elevated the community's role from mainly passive information-receivers to true participants and stakeholders in the development negotiations (although the developer's commitment to jobs was not secured in enforceable contract form ultimately). And in the East Shore PSEG expansion case, community groups succeeded in using a statutory mechanism available to them for participation to develop an *even more* robust informal process than what the already uniquely robust statute envisioned.

### **3. The Role of Class**

Nevertheless, the case studies presented indicate that sophistication and class matters in all of this. More specifically, the class and education of a neighborhood seems to lead to 1) more intensive community involvement in discussions with City and/or developers earlier in the process; 2) greater deference at the CPC and Board in the form of extensions for public hearing or comment; and 3) better use of formal mechanisms for participation as well as legal challenges to land use decisions on the part of residents.

First, as previously noted, the Hooker school case shows a highly sophisticated neighborhood taking control of the land use decision-making process early on. Notably, residents continually pushed the subcommittee and City to consider what constitutes appropriate notice to neighbors, challenged the definition of "public," and ensured that the skirmishes fought through letters to the editor of the New Haven Register provided continued updates to the neighborhood on the process as well as notice of upcoming meetings and opportunities for involvement. In the East Shore case, an established community of sophisticated environmental advocates worked closely with the neighborhood to secure an active place in negotiations with the City and power company before any plans or decisions were solidified. They moved quickly beyond a

relationship where the community only received information from the power company about its plans to a more substantive kind of involvement.

Second, it is notable that the CPC and Board of Aldermen extended the process repeatedly and considerably when neighbors in the SOM case complained of insufficient input and generally voiced opposition to the project. The first public hearing at the CPC occurred in November 2009 and did not reach a full vote by the Board of Aldermen until March 2010. In contrast, despite vocal opposition at the CPC hearing on the Winchester proposed PDD modifications and multiple complaints that neighbors had not felt included in the process or had access to the CPC application, the Board unanimously decided to move the decision forward. Perhaps commissioners in the SOM case saw more legitimate arguments where residents focused on traditional land use issues like traffic, light, and home values, as opposed to the Winchester case where residents mainly asked the developer to create jobs. However, one then has to ask to what extent the CPC may be swayed by opposition that simply happens to find more sophisticated outlets or framing strategies for disguising simple NIMBYism. Indeed, in analyzing CPC minutes from 2007-2010, it is notable that the one other instance where the CPC extended the hearing to give the developer additional time to meet with the community and negotiate occurred when Albertus Magnus College sought to expand a parking lot in the East Rock neighborhood (the same neighborhood involved in the Hooker school case).

Yet, the idea that traditional property-related arguments like those invoking light or traffic constitute more legitimate objections to a development than non-property concerns like job creation points back to the equity or empowerment theories for community participation outlined in Section III. In essence, should wealthier residents have more power to shape their neighborhoods than low-income, struggling individuals simply because they can use more

traditional zoning and planning arguments to oppose a development in favor of what is arguably an already pleasant or comfortable status quo enabled by existing zoning codes? And conversely, should struggling communities like Newhallville and Dixwell who want and need development not have any say in how that development should improve, at least to the extent feasible, the status quo of their neighborhood through things like job creation?

Third, as previously discussed, the East Shore case shows how a community's access to legal expertise can significantly affect the kind of participation process that develops. Lawyers in that case used the threat of using state public hearing statutes to gain leverage while also shaping the substance of the CBA. The Hooker and SOM cases show lawyers actively participating in the CPC and Board public hearings. They posed a threat of litigation, presumably creating some leverage for their clients, while ensuring that the public record reflected their clients' concerns adequately in case of an appeal. Notably, another school expansion in the Hill neighborhood, one of the City's poorest, did not have lawyers intervene until public hearings had concluded.<sup>283</sup> Residents filed a lawsuit challenging the decision on equal protection grounds, among other claims. They argued, for instance, that "when the [City] defendants engaged in the Prince-Welch school construction project, the defendants intentionally excluded them from participating in the site selection process, and that the defendants intentionally excluded them on the basis of race."<sup>284</sup> In rejecting all of plaintiffs' claims in the case, the court at one point faulted the plaintiffs for not having initiated their lawsuit sooner under the doctrine of laches. It found that "because the plaintiffs ha[d] not offered a reason why they waited approximately two years

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<sup>283</sup> Interview with Karyn Gilvarg, *supra* note 6.

<sup>284</sup> *Batiste v. City of New Haven*, 239 F. Supp. 2d 213, 216 (D. Conn. 2002).



before filing suit and because the defendants ha[d] demonstrated significant prejudice,” the defense of laches barred one of plaintiffs’ claims.<sup>285</sup> The court did not consider whether the plaintiffs’ educational levels or lack of sophistication could have contributed to their delayed legal action. Ultimately, and in perhaps the most extreme example of how a community’s access to expertise can affect the decision-making process, at least some resident activists in the Hooker case were involved in successfully lobbying for statutory reform at the state level that would alter New Haven’s PDD process in their favor.

#### **4. The PDD Process as Useful Tool for Communities Seeking More Meaningful Participation**

Finally, the Hooker school, Winchester, and SOM developments all highlight how the PDD process, which is also the process for amending the text of zoning ordinances or map, (hereinafter “PDD process”) repeatedly acts as a useful entry point and vehicle for meaningful community participation. In the Winchester case, in particular, the PDD fight marked a peak point for community participation and arguably formed a crucial leverage point for negotiations between community and developers. In the SOM case, the CPC first extended the hearing for additional written submissions so that it took at least two months to pass. Evidence indicates that Yale may have responded to the pressure first created at the CPC hearing when it agreed to provide neighbors more side yard “breathing room.”<sup>286</sup> The Legislation Committee at the Board of Aldermen then extended its own hearing. Yale ultimately submitted at least 200 signatures in support over 30 written letters at the final hearing, and over 150 people attended. These facts

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<sup>285</sup> *Id.* at 277.

<sup>286</sup> Allan Appel, *SOM Plan Sparks Fiery City Hall Hearing*, NEW HAVEN INDEPENDENT (Jan. 29, 2010), [http://www.newhavenindependent.org/index.php/archives/entry/som\\_do\\_som\\_dont/](http://www.newhavenindependent.org/index.php/archives/entry/som_do_som_dont/).

could demonstrate that the extension allowed for additional and potentially valuable developer community outreach and negotiations.

Indeed, Ravikumar Jayaraman's previous study of New Haven's PDD process highlights how the PDD incorporates neighborhood interests to achieve a "process [that] enables applicants to bargain with neighbors, city planners, and local government to find deals where everyone can benefit."<sup>287</sup> This paper generally agrees with Ravikumar Jayaraman's observation that the PDD process presents a valuable tool for community input in zoning decisions. However, it adds a few caveats.

Ravikumar Jayaraman's article particularly highlights how the PDD process facilitates representation of community interests by imposing few standards for review, allowing the CPC and Board of Aldermen to consider wide ranging issues and concerns. Indeed, while the CPC is still generally limited to considering the "quality of the proposal," the Board of Aldermen hearing is seen as even more open to discussion of any "issues...constituents deem relevant."<sup>288</sup> Additionally, the author sees the involvement of aldermen as a means of ensuring that community interests are represented in how other aldermen generally defer to a ward's vote when the PDD only affects that particular ward.<sup>289</sup> Ravikumar Jayaraman also stresses that aldermen ensure that unreasonable neighbors are not given undue power.<sup>290</sup>

In terms of caveats and additional observations, I note that Ravikumar Jayaraman's account may overstate the importance of aldermen in making the PDD process a tool for substantial community input. Organizers, aldermen, and city staff repeatedly challenged the

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<sup>287</sup> Ravikumar Jayaraman, *supra* note 9, at 455.

<sup>288</sup> *Id.* at 441.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 442.

representativeness of aldermen in that their involvement is often arbitrary and are oftentimes elected by only a few hundred people in their ward.<sup>291</sup> Second, I caution that a community's class and education may affect the extent to which the PDD serves as a useful tool for community participation. The process is only useful for communities wishing to oppose PDDs or other zoning amendments subject to the same path for approval to the extent that they understand the process and possess some organizing skills. Third, I posit that the time delay built into the PDD process via the three separate hearings required presents a valuable organizing tool in and of itself.

Ultimately, in practice, the PDD process appears to promote external organizing and more democratic decision-making in land use by offering communities, and not just aldermen, a real entry point into substantive negotiations with City staff and/or developers prior to the final Board of Aldermen decision. This quality, in turn, may require additional thinking about how changes to the PDD's standards could alter the leverage communities currently derive from the process. It is possible that limiting the CPC's and Board of Aldermen's PDD discretion could reduce the potential influence of opposition to a project and leave communities not otherwise equipped to design (or demand) a meaningful process for participation with even less influence.

## **B. The Impact of Takings Law on New Haven's Approach to Community Participation**

In attempting to understand how takings law may influence the City's approach to community participation, one could arguably look to case studies over time. However, interviews with the City's chief planner and Deputy Director of Economic Development indicate that such analysis is not necessary in this case. When explicitly asked if the City has considered takings

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<sup>291</sup> Interview with Frances "Bitsie" Clark, *supra* note 100; Interview with Hugh Baran and Mandi Jackson, *supra* note 100; Interview with Kevin Ewing, *supra* note 103.

law in its approach to community participation, Gilvarg answered definitively that the City is more concerned with developers leaving the city than with potential takings problems. In other words, she is more concerned with ensuring that community groups do not impose unreasonable demands on developers because they might simply choose not to invest in the City than with designing a process that avoids coercion. Bialecki, on the other hand, appeared to leave the legal considerations to Gilvarg's department and did not indicate that he or others in the EDA have considered takings law in their community participation approach.<sup>292</sup> Additionally, a desire to avoid creating liability through formal processes also appears to influence City Plan more than consideration of the potential indirect implications of *Nollan* and *Dolan*.<sup>293</sup> Thus, the tension between the trend for increased community participation and takings law changes, which initially prompted this paper's investigation of community participation in New Haven, does not appear to represent a real tension for New Haven planners.

## VII. CONCLUSION

In sum, this is only a limited look at how one City thinks about and carries out mechanisms for community participation. It appears that New Haven's planners, zoning officials, residents, and neighborhood representatives, for the most part, have internalized the trend towards increasing meaningful community participation in land use decision making. New Haven operates under a very limited formal process for community participation despite its outward commitment to such participation in principle. Nonetheless, the land use approval process offers substantial room for communities to shape the process according to popular and organized demands, especially the more "public" the project at play. Moreover, New Haven's

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<sup>292</sup> Interview with Karyn Gilvarg, *supra* note 106; Interview with Karyn Gilvarg, *supra* note 6; Interview with Tony Bialecki, *supra* note 106.

<sup>293</sup> Interview with Karyn Gilvarg, *supra* note 106.

planners and economic development officials have not changed or otherwise shaped community participation processes with recent takings decisions in mind. Other potential implications of community participation, such as competitive federalism, factor much more prominently in their strategy.

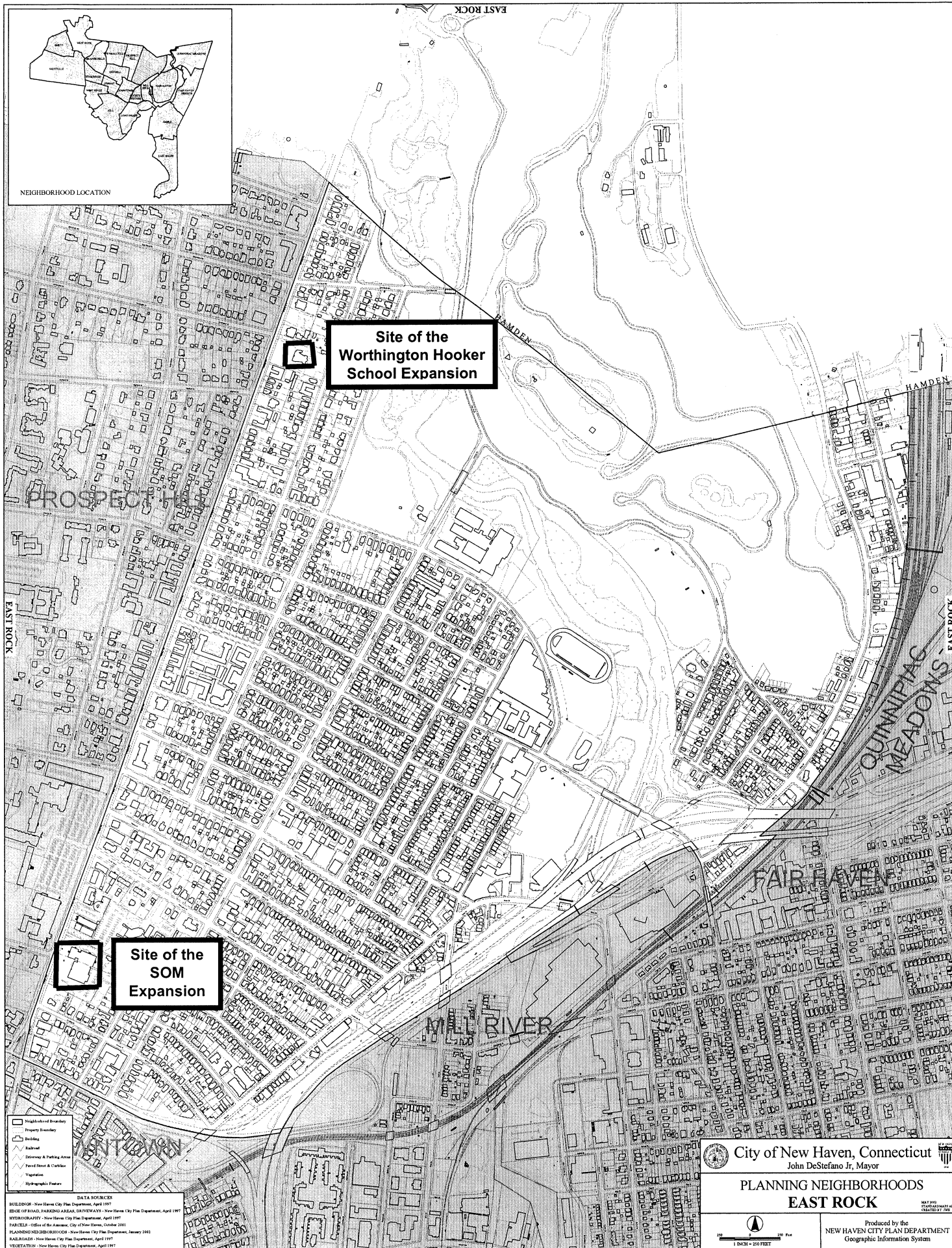
However, the equity implications of how class may determine just how successful communities will be in shaping ad hoc community participation processes in New Haven merit a reevaluation of the City's current approach to such participation. On equity grounds, it seems that planners could, and perhaps should, think about how to better empower less sophisticated communities to derive the kind of leverage and bargaining that wealthier, more educated communities like East Rock are already achieving. Indeed, even if one doubts the value of or need for more meaningful participation, the impact of class on how communities engage with land use suggests that the same equity concerns would remain (if they will not actually be exacerbated), if one were to simply revert to the minimum participation requirements embodied in notice and hearing laws. For example, with only a two week notice of a zoning hearing, a sophisticated resident with some knowledge of zoning will be much more likely to attend, seek legal counsel, and shape the official record in his favor than a resident with less education. The less sophisticated resident is more likely to remain in the dark and forego *any* involvement in decisions that will shape his or her neighborhood.

On the other hand, public interest lawyers and community activists may want to think about new ways to take advantage of the City's current openness to ad hoc participation procedures. They may also want to consider how to better utilize the PDD process' flexibility and perhaps even resist changes to the current PDD standard that would reduce that flexibility. Ultimately, low-income, less sophisticated communities may stand to gain significantly from

New Haven planners' proven openness to ad hoc community participation processes. Finally, this paper suggests that additional research on the how communities participate in land use decision making in other cities could help establish, among other things, 1) whether low-income, minority communities have benefited from ad hoc participation procedures elsewhere; 2) how formal mechanisms for achieving more meaningful community participation than what is normally required in notice and hearing laws may function in other cities; and 3) perhaps even whether we should reevaluate due process requirements in land use decision making given the disparities in how wealthy, predominantly white communities interact with land use versus low-income, predominantly minority communities.

# **APPENDIX A**

(East Rock neighborhood)





# **APPENDIX B**


(Newhallville neighborhood)



NEIGHBORHOOD LOCATION




**APPROXIMATE BOUNDARY  
OF THE SCIENCE PARK  
DEVELOPMENT**



**City of New Haven, Connecticut**  
John DeStefano Jr, Mayor

DATE: 01/01/2001  
DRAWN BY: JLM

**PLANNING NEIGHBORHOODS  
NEWHALLVILLE**



1 INCH = 200 FEET

Produced by the  
NEW HAVEN CITY PLAN DEPARTMENT  
Geographic Information System

**LEGEND**

- Neighborhood Boundary
- Property Boundary
- Building
- Parking & Parking Area
- Street
- Water
- Topographic Feature

**DATA SOURCES**

BUILDINGS - New Haven City Plan Department, April 1997

BOUNDARY - New Haven City Plan Department, April 1997

BOUNDARY - New Haven City Plan Department, April 1997

BOUNDARY - Office of the Mayor, City of New Haven, October 2001

PLANNING NEIGHBORHOODS - New Haven City Plan Department, January 2001

ROADS - New Haven City Plan Department, April 1997

TOPOGRAPHY - New Haven City Plan Department, April 1997

# **APPENDIX C**

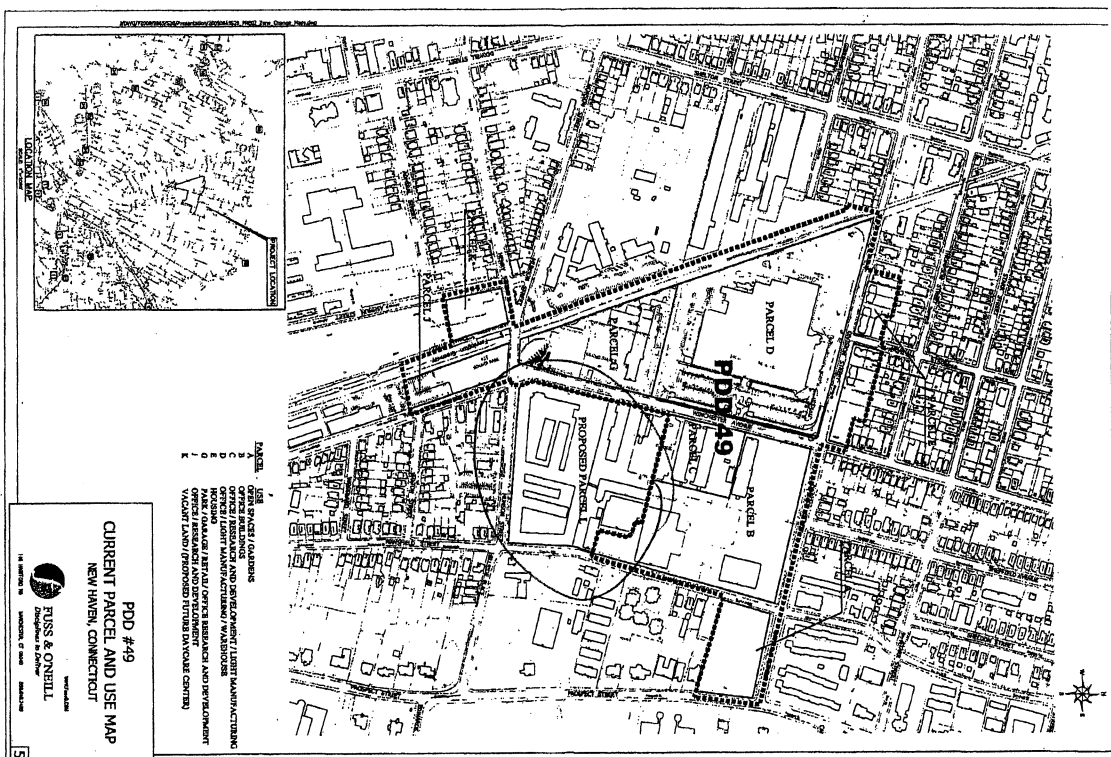
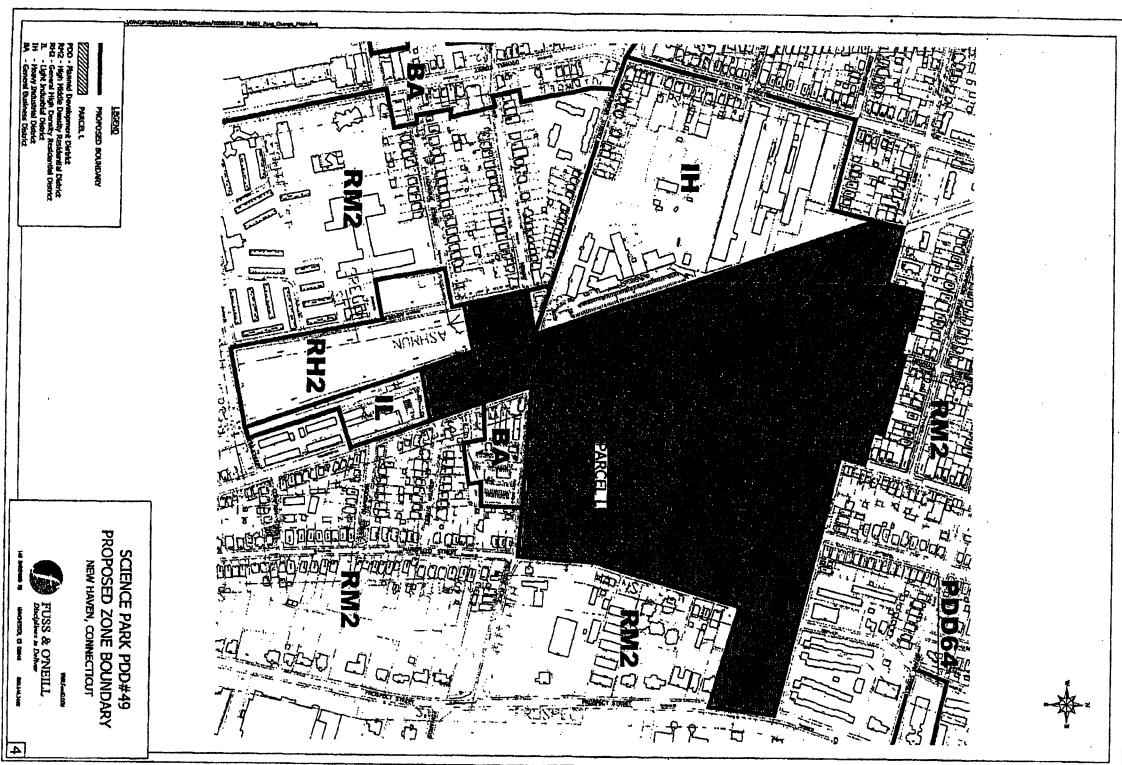
(Dixwell neighborhood)



# **APPENDIX D**

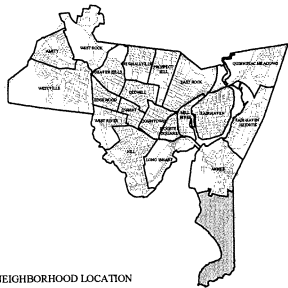
(Science Park Development Parcels)





# **APPENDIX E**

(East Shore neighborhood)



NEIGHBORHOOD LOCATION



**PSEG  
Power Plant  
(just north  
of this  
arrow)**

- Neighborhood Boundary
- Property Boundary
- Building
- Railroad
- Driveway & Parking Area
- Paved Street & Curbside
- Vegetation
- Hydrographic Feature

**DATA SOURCES**

BUILDING - New Haven City Plan Department, April 1997  
 EDGE OF ROAD, PARKING AREA, DRIVEWAY - New Haven City Plan Department, April 1997  
 HYDROGRAPHY - New Haven City Plan Department, April 1997  
 PARCELS - Office of the Assessor, City of New Haven, October 2001  
 PLANNING NEIGHBORHOODS - New Haven City Plan Department, January 2002  
 RAILROADS - New Haven City Plan Department, April 1997  
 VEGETATION - New Haven City Plan Department, April 1997

**City of New Haven, Connecticut**  
 John DeStefano Jr, Mayor

**PLANNING NEIGHBORHOODS**  
**EAST SHORE**

1 INCH = 300 FEET

NORTH

MAY 1998  
 BY JOHN DESTEFANO JR.  
 CREATED BY PPS

Produced by the  
 NEW HAVEN CITY PLAN DEPARTMENT  
 Geographic Information System